(6)

No. 91-998-CFX
Status: GRANTED

Title: Commissioner of Internal Revenue, Petitioner
v.
Nader E. Soliman

Docketed:
December 19, 1991

Court: United States Court of Appeals for
the Fourth Circuit

Counsel for petitioner: Starr,Kenneth W.

Counsel for respondent: Sokolow,David M.

Time to file ext by CJ to & inc Dec. 20, 1991 CITED

Entry	Date	Note	Proceedings and Orders
3	Nov 5 1991		Application for extension of time to file petition and order granting same until November 20, 1991 (Rehnquist, November 6, 1991).
5	Nov 5 1991	G	Application (A91-324) to extend the time to file a petition for a writ of certiorari from November 20, 1991 to December 20, 1991, submitted to The Chief Justice.
6	Nov 6 1991		Application (A91-324) granted by the Chief Justice extending the time to file until December 20, 1991.
4	Dec 19 1991	G	Petition for writ of certiorari filed.
7	Jan 22 1992		DISTRIBUTED. February 21, 1992
8	Feb 3 1992	P	Response requested -- WHR. (Due March 3, 1992)
9	Feb 24 1992		Waiver of right of respondent Nader E. Soliman to respond filed.
10	Feb 26 1992		REDISTRIBUTED. March 20, 1992
11	Mar 23 1992		Petition GRANTED.
			**********
12	Mar 27 1992	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
13	Apr 6 1992		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
14	May 7 1992		Brief of petitioner Commisssioner of Internal Revenue filed.
15	Jun 9 1992		Brief of respondent Nader E. Soliman filed.
16	Jul 13 1992		Reply brief of petitioner filed.
17	Jul 14 1992		CIRCULATED.
18	Jul 21 1992		SET FOR ARGUMENT MONDAY, OCTOBER 5, 1992. (1ST CASE).
19	Jul 29 1992		Record filed.
		*	Original proceedings United States Court of Appeals for the Fourth Circuit and United States Tax Court.
20	Oct 5 1992		ARGUED.

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91-998

No.

Supreme Court,
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In the Supreme Court of the United States

OCTOBER TERM, 1991

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NADER E. SOLIMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether an office maintained by a self-employed person in his residence qualifies as his "principal place of business" under Section 280A of the Internal Revenue Code, 26 U.S.C. 280A—and the expenses related to that area of his home are therefore properly deducted in computing his taxable income—if he spends the majority of his time working elsewhere in the course of performing the services from which his income is derived.

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In the Supreme Court of the United States

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No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NADER E. SOLIMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 935 F.2d 52. The opinion of the Tax Court (App., *infra*, 12a-41a) is reported at 94 T.C. 20.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1991. A petition for rehearing with a suggestion of rehearing en banc was denied on August 22, 1991, with three judges dissenting (App., *infra*, 44a). The Chief Justice extended the time for filing a petition for a writ of certiorari to and in-

cluding December 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 280A of the Internal Revenue Code, 26 U.S.C. 280A, provides in pertinent part:

> **§ 280A. Disallowance of certain expenses in connection with business use of home, rental of vacation homes, etc.**
>
> **(a) General rule**
>
> Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.
>
> * * * * *
>
> **(c) Exceptions for certain business or rental use; limitation on deductions for such use**
>
> **(1) Certain business use**
>
> Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—
>
> (A) [as] the principal place of business for any trade or business of the taxpayer[.]
>
> * * * * *

STATEMENT

1. Respondent is a self-employed anesthesiologist. During 1983, respondent practiced his profession at Suburban Hospital in Bethesda, Maryland, at Shady Grove Hospital in Rockville, Maryland, and at Loudon Memorial Hospital in Leesburg, Virginia, where he administered anesthesia to patients, cared for patients immediately after surgery, and treated patients for pain. He spent 30 to 35 hours each week working at these three hospitals. Approximately 80 percent of that time (or about 28 hours each week) was spent at Suburban Hospital. None of the hospitals provided respondent with a personal office (App., *infra*, 2a).

Respondent used a spare bedroom in his residential condominium as an office, where he kept patient records, correspondence, billing records, medical journals and texts. Respondent worked two to three hours a day in his home office, where he spoke on the telephone with surgeons, patients, and hospitals, kept records, prepared for treatments and presentations, satisfied continuing medical education requirements and kept abreast of advances in anesthesiology (App., *infra*, 2a, 8a; C.A. App. 99).

In his federal income tax return, respondent claimed deductions for condominium fees, utilities, and depreciation attributable to the home office. He also claimed deductions for expenses incurred in driving between his residence and the hospitals (App., *infra*, 9a). The Commissioner disallowed these deductions because the office was not respondent's "principal place of business" under Section 280A of the Internal Revenue Code, 26 U.S.C. 280A (App., *infra*, 2a).[1]

2. Respondent filed a petition in the Tax Court seeking review of the resulting deficiency (App.,

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[1] Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended and in effect during the year in issue (1983).

infra, 2a). A divided Tax Court concluded that respondent's home office was his "principal place of business" within the meaning of Section 280A. The Tax Court majority noted that it previously had regarded the "focal point" of a taxpayer's business—*i.e.*, the place where goods and services are provided to customers and revenues are generated—as his "principal place of business" (*id.* at 18a). Under that "focal point" test, the court stated, respondent's office at home was not his "principal place of business" because the activities respondent performed at home, while "essential to his medical practice" (*ibid.*), were "ancillary to the primary income-generating services [respondent] performed as an anesthesiologist at the hospitals" (*ibid.*).

The Tax Court majority observed (App., *infra*, 13a-14a), however, that the validity of the "focal point" test had been questioned by the courts of appeals in three cases reversing Tax Court decisions holding that the taxpayer's home office was not his "principal place of business." See *Drucker* v. *Commissioner*, 715 F.2d 67 (2d Cir. 1983); *Weissman* v. *Commissioner*, 751 F.2d 512 (2d Cir. 1984); *Meiers* v. *Commissioner*, 782 F.2d 75 (7th Cir. 1986). The court therefore concluded that it would no longer follow its "focal point" test and stated that it would instead regard a taxpayer's office at home as his "principal place of business" within the meaning of Section 280A when the "taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business" (App., *infra*, 24a). The court held that respondent's home office satisfied this standard even though respondent spent a greater part of his working time at Suburban

Hospital, where he performed his most important work (*id.* at 23a).[2]

Chief Judge Nims dissented, joined by Judges Chabot, Parker, Clapp and Parr. He pointed out that, in the decisions upholding home-office deductions, the most important factor "was that the taxpayer spent the majority of his or her business time at the 'home office,' rather than at the place where goods or services were provided to customers or clients or where income is produced" (App., *infra*, 28a). Chief Judge Nims criticized the analysis of the Tax Court majority because it would allow deductions for home-office expenses even when the home is *not* the "principal" place of business, as the statute requires. The majority's test ignores the very reason that Section 280A was enacted: it "takes us all the way back to square one; i.e., to the situation which existed even before Congress took what it thought would be the remedial action of section 280A" (App., *infra*, 29a).

Judge Rüwe dissented in a separate opinion, joined by Chief Judge Nims and Judges Clapp and Parr. Judge Rüwe noted that the test adopted by the Tax Court majority "eliminates the need to compare the importance of home office activities with the importance of activities at the other place of business or to compare the amount of time spent at the home office with the amount of time spent at the other place of business" (App., *infra*, 32a). In his view, the taxpayer's "principal place of business" is the place where the "dominant portion of his work is accom-

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[2] The Tax Court also allowed petitioner to deduct the expenses of traveling between his home and the three hospitals, based on the court's finding "that petitioner's home office is his principal place of business" (App., *infra*, 21a). On appeal, the court of appeals did not discuss this issue separately.

plished" (*ibid.*, quoting from *Weissman* v. *Commissioner*, 751 F.2d at 514). Judge Rüwe concluded that, in overruling the "focal point" test, the Tax Court majority failed to make "a specific qualitative determination that the home office activities were at least as important to the taxpayer's business as the activities performed away from the home office" (*id.* at 36a). Judge Rüwe also pointed out (*id.* at 37a-39a) that the decision in this case conflicts with *Pomarantz* v. *Commissioner*, 867 F.2d 495, 497-498 (9th Cir. 1988), where the court of appeals held that the "principal place of business" of an emergency room physician was the hospital where the taxpayer spent the majority of his working time and performed the most important tasks of his profession.

3. A divided court of appeals affirmed. The majority noted (App., *infra*, 4a n.2) that the "focal point" test had been criticized in *Drucker*, *Weissman* and *Meiers*. The court concluded that the new test adopted by the Tax Court in this case "does not eviscerate the requirements of section 280A, but simply replaces the inflexible and potentially unjust 'focal point' test" with a standard that "more accurately reflects the purposes and requirements of section 280A" (*id.* at 6a (footnote omited)). The court stated that the new test adopted by the Tax Court also is consistent with Proposed Treas. Reg. § 1.280A-2(b)(3), which would allow traveling salesmen to deduct "home office" expenses even though they spent most of their time on the road, provided that they spend a substantial amount of time doing paperwork at home. Although the majority acknowledged that the proposed regulation was not binding on the Commissioner, it concluded that it "does evince a policy to allow 'home office' deductions for taxpayers who maintain 'legitimate' home offices, even if the taxpayer does not spend a majority of his time in the office" (App., *infra*, 5a-6a).

Judge Phillips dissented because the Tax Court analysis "eliminates any need for comparing a taxpayer's use of several business locations to determine which constituted his 'principal place of business'" (App., *infra*, 8a). He observed that "the term 'principal place of business' compels an inquiry directed to that specific question—which is the *one* that is 'principal.' Otherwise Congress could have used language such as 'essential place of business' or 'necessary place of business'" (*ibid.*). Judge Phillips noted that all other decisions upholding deductions for home-office expenses involved "situations where the taxpayer spent the majority of his time in his home office, or did his most important work there, or both" (*ibid.*). Judge Phillips concluded (*ibid.*) that the court should have followed the decision of the Ninth Circuit in *Pomarantz* v. *Commissioner*, 867 F.2d at 497-498, where an emergency care physician's deduction of "home office" expenses was disallowed because his home was not his "principal" place of business.

REASONS FOR GRANTING THE PETITION

The court of appeals held that an office located in a taxpayer's residence—where he performs purely administrative functions of his business—may be considered his "principal place of business" under Section 280A even though the taxpayer spends a greater part of his working time, and performs his most important professional functions, at another place. This holding is in direct conflict with the decision of the Ninth Circuit in *Pomarantz* v. *Commissioner*, 867 F.2d at 497, and conflicts with the reasoning of the

decisions of the Second Circuit in *Drucker* v. *Commissioner*, and *Weissman* v. *Commissioner*, and of the Seventh Circuit in *Meiers* v. *Commissioner*. The issue presented in this case affects many thousands of individuals who maintain offices in their homes but spend more time and perform their most important income-producing tasks at other places of business. Unless the conflict is resolved by this Court, these individuals will receive disparate tax treatment based entirely upon the happenstance of their geographical location.

1. To be deductible, the expenses of maintaining a home office must not only be "ordinary and necessary" expenses of the taxpayer's business under Section 162 of the Code, they must also satisfy the additional requirements of Section 280A. See 26 U.S.C. 161, 261. Section 280A(a) provides generally that no deduction is allowable "with respect to the use of a dwelling unit which is used by the taxpayer * * * as a residence." 26 U.S.C. 280A(a). Section 280A(c)(1)(A) makes an exception to the general rule of nondeductibility, however, "to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis" as the "principal place of business for any trade or business of the taxpayer." 26 U.S.C. 280A(c)(1)(A).[3]

[3] Expenses attributable to a home office that is *not* the taxpayer's "principal place of business" may be deducted if the office is used regularly and exclusively "as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business" (Section 280A(c)(1)(B)) or if the office is housed in "a separate structure * * * not attached to the dwelling unit" (Section 280A(c)(1)(C)). 26 U.S.C. 280A(c)(1)(B) and (C).

In this case, it is undisputed that taxpayer did not meet with or treat patients at home. There is also no claim that the home office was located in a separate structure not attached to the dwelling unit.

Section 280A was enacted as part of the Tax Reform Act of 1976, Pub L. No. 94-455, § 601, 90 Stat. 1569-1572. The statute responded to what Congress perceived to be "a great need for definitive rules * * * as to the correct standard governing the deductibility of expenses attributable to the maintenance of an office in the taxpayer's personal residence" (H.R. Rep. No. 658, 94th Cong., 1st Sess. 160 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. Pt. 1, at 147 (1976)). Prior to enactment of Section 280A, courts had permitted the deduction of "home office" expenses under Section 162 whenever such expenses were "appropriate and helpful" to the taxpayer's business. See, *e.g.*, *Newi* v. *Commissioner*, 432 F.2d 998 (2d Cir. 1970); *Bodzin* v. *Commissioner*, 60 T.C. 820 (1973), rev'd, 509 F.2d 679 (4th Cir.), cert. denied, 423 U.S. 825 (1975). Congress was concerned that (H.R. Rep. No. 658, *supra*, at 160; S. Rep. No. 938, *supra*, at 147):

> [i]n many cases the application of the appropriate and helpful test would appear to result in treating persona! living, and family expenses which are directly attributable to the home (and therefore not deductible) as ordinary and necessary business expenses, even though those expenses did not result in additional or incremental costs incurred as a result of the business use of the home.

In enacting Section 280A, Congress intended substantially to limit the deductibility of "home office" expenses by establishing stringent, objective standards for deductibility. To this end, Congress generally precluded the deduction of such expenses except

when the home office is the taxpayer's "principal place of business." 26 U.S.C. 280A(c)(1)(A); see also note 3, *supra*.

2. The term "principal place of business" is not defined in the statute. Prior to the decision in this case, however, the courts of appeals had consistently applied the statutory term "principal" to mean the primary or chief place of the business conducted by the taxpayer. This comports with the dictionary definition of the word "principal," which is "first or highest in rank, importance, value, * * * chief, foremost." *Random House Dictionary Of The English Language* 1539 (2d ed. 1987).

The determination of a taxpayer's "principal place of business" requires a comparison of the various locations where the taxpayer carries on his trade in order to determine the most significant, or "principal," place of business. Before it issued its decision in this case, the Tax Court had used a "focal point" test for this purpose. The "focal point" test required a comparison of such objective factors as the location where goods and services are provided to customers or clients, the length of time spent by the taxpayer at each place of business and the relative amount of income generated at each place of business. See, *e.g.*, *Baie* v. *Commissioner*, 74 T.C. 105 (1980). The Second and Seventh Circuits cited these same factors, but gave greater weight to the *time* spent by the taxpayer at each location and the importance of the functions performed at each, with less emphasis on the location where income is produced. *Drucker* v. *Commissioner*, 715 F.2d at 69 (majority of concert musician's work time spent practicing at home); *Weissman* v. *Commissioner*, 751 F.2d at 514 (college professor had no office on campus and spent 80% of his

time working at home); *Meiers* v. *Commissioner*, 782 F.2d at 79 ("a major consideration ought to be the length of time the taxpayer spends in his home office"). The Ninth Circuit, while declining to adopt "a specific standard," determined in *Pomarantz* v. *Commissioner*, 867 F.2d at 497-498, that the taxpayer's "principal place of business" is the place where he "consistently spen[ds] more time on duty," where he exercises the skills constituting "[t]he essence of his profession," and where he "generate[s] income." Prior to the decision in this case, no court had held that a taxpayer's home could be regarded as his "principal place of business" even though he spent more of his working time and performed his most important work elsewhere.

3. The court below held (App., *infra*, 3a-5a), however, that respondent's spare bedroom was his "principal place of business" because (i) an office was essential to his business, (ii) the hospitals (where he spent most of his working time) did not provide him with an office and (iii) he spent a substantial amount of time (approximately ten hours per week) performing administrative tasks related to his profession in his home office. Under the criteria adopted by the court of appeals in this case, if the taxpayer's home office is appropriate and necessary to his trade or business, that office may constitute the taxpayer's "principal place of business" even though the bulk of the taxpayer's work is performed at some other location or locations. The word "principal" has thus been eliminated from the statute.

In this case, Suburban Hospital was respondent's "principal place of business" in any ordinary sense of the term. The operating room and the recovery room were the locations where respondent practiced

medicine, generated fees, and spent the greatest single segment of his working time. The three hospitals at which he practiced were, in the aggregate, the location of the preponderant majority of his working time. The essence of his profession as an anesthesiologist is the preparation for surgery, the administration of anesthesia to patients during surgery, and the care of those patients immediately after surgery, tasks that can not be performed other than at a hospital. The fact that respondent also spends ten hours per week doing paperwork in his spare bedroom did not make that room his "principal place of business."

4. The decision of the court of appeals conflicts with the decisions of other courts of appeals. Had the court engaged in a comparative analysis of the time and nature of the work performed by the taxpayer at various job locations—as required by the plain terms of Section 280A and by decisions of the Second, Seventh and Ninth Circuits—it would have been compelled to conclude that respondent's business was centered in the hospitals where he treated patients, not his office at home. As Judge Phillips noted in dissent, the test endorsed by the majority "avoids what I think a fair application of § 280A(c)(1)(A) flatly compels: a comparison of the uses of multiple business locations to determine which is *the* principal place of business of a taxpayer" (App., *infra*, 10a).

The standard for deductibility adopted by the majority is virtually the same as the "appropriate and helpful" test that Congress laid to rest in enacting Section 280A. As Judge Phillips observed in his dissent, Congress did not provide for the deduction of the expenses of maintaining a home office if that office was an "essential place of business" or a "necessary place of business" (App., *infra*, 8a). In fact, a proposed Senate amendment would have allowed a deduction for "home office" expenses "where no office or fixed location is provided by the employer for use by the employee" (S. Rep. No. 938, *supra*, at 149), but that proposal was rejected in conference (S. Conf. Rep. No. 1236, 94th Cong., 2d Sess. 435 (1976)). Instead, Congress made a deliberate legislative judgment to preclude the deduction of any expenses incurred in maintaining an office in a residence unless that office constitutes the taxpayer's "principal place of business." By ignoring this plain congressional mandate, the court of appeals has failed to honor the clear language and history of the statute.

The court of appeals misinterpreted (App., *infra*, 4a) *Drucker*, *Weissman* and *Meiers* in reaching its decision. Those cases support the Commissioner's position that respondent's "principal place of business" was Suburban Hospital, where he spent the largest segment of his working time, as well as the largest segment of his time engaged in practicing his profession. In choosing the taxpayer's "principal place of business," the Second Circuit in *Drucker* emphasized that "[b]oth in time and in importance, home practice was the 'focal point' of the appellant musicians' employment-related activities" (715 F.2d at 69). Similarly, in *Weissman*, that court defined "principal place of business" as "the place where the dominant portion of [the taxpayer's] work is accomplished" (751 F. 2d at 514). In *Meiers*, the Seventh Circuit compared the importance of the places of business "in terms both of hours worked and * * * of functions performed," and expressed the view that "a major consideration ought to be the length of time the taxpayer spends in the home office as opposed to

other locations" (782 F.2d at 79).[4] And, significantly, in *Pomarantz*, the Ninth Circuit held that the principal place of business of an emergency care physician was the hospital where he worked because he "consistently spent more time on duty at the hospital rather than at home" and "[t]he essence of his profession is the hands-on treatment of patients" (867 F.2d at 963), which he did only at the hospital.[5] The decision in the present case conflicts dramatically and irreconciliably with the decision in *Pomarantz*, and

[4] In most cases, the taxpayer will spend the greatest part of his time at the location where he performs his most important tasks, as is true in this case. In our view, the place where the taxpayer performs his most important, income-generating function, is his "principal place of business," even if he spends some greater part of his time elsewhere. The Second Circuit concluded in *Drucker*, however, that the most important aspect of a musician's business was the time he spent practicing and not the time he spent performing, and it concluded that home practice rooms maintained by members of the Metropolitan Opera orchestra were the musicians' principal places of business, rather than Lincoln Center, as the Tax Court had found. Similarly, in *Weissman* it rejected the Tax Court's conclusion that a salaried college professor was paid to teach, concluding instead that his important function was to publish scholarly materials, and that the home study where the professor spent most of his time was a more important place of business than his classroom. The approach taken by the Tax Court and the court of appeals below is nonetheless manifestly at odds with the comparative analysis the Second Circuit determined was necessary in *Drucker* and *Weissman*, as well as with the Seventh Circuit's approach in *Meiers*.

[5] The court of appeals majority did not even cite *Pomarantz*, much less attempt to distinguish the case, even though Judge Phillips pointed out in dissent (App., *infra*, 10a) that *Pomarantz* should be controlling in this case.

is also inconsistent with the foregoing decisions of the other courts of appeals.

5. The court of appeals erred in relying (App., *infra*, 5a-6a) on Section 1.280A-2(b)(3) of the Proposed Income Tax Regulations, 45 Fed. Reg. 52,399 (1980), as amended, 48 Fed. Reg. 33,320 (1983), which would allow traveling salesmen to deduct "home office" expenses if they spend substantial amounts of time doing paperwork at home. As the court of appeals itself noted (App., *infra*, 4a-5a), it is well settled that proposed regulations do not have any precedential force. *E.g.*, *Estate of Leavitt* v. *Commissioner*, 90 T.C. 206, 218 (1988), aff'd, 875 F.2d 420 (4th Cir.), cert. denied, 493 U.S. 958 (1989). In any event, the proposed regulation does not support the Fourth Circuit's decision. As pointed out by Judge Phillips in dissent, while traveling salesmen may spend more time on the road than they do in their home offices, they may spend more time working in their home offices than in any other single place (App., *infra*, 10a n.5). Respondent, however, spent the majority of his time at the three hospitals, spent more time at Suburban Hospital than he did at his home office, and his office "is not the base for his business in the same way that it would be for a salesperson" (*ibid.*)

6. The question presented in this case has substantial importance to the proper administration of the tax laws because it affects many thousands of individuals who perform some work at home but spend most of their time and perform their most important work elsewhere. The courts below have vastly expanded the class of taxpayers eligible to claim a dededuction for "home office" expenses. Under the panel's opinion, many taxpayers who perform incidental bus-

iness duties at home may now take the position on future returns—or on amended returns seeking the refund of taxes already paid—that they are entitled to write off the expenses of maintaining home offices even though they spend a greater part of their time and perform their most important duties elsewhere.[6] For this reason, the decisions of the Tax Court and of the court of appeals in this case have been the subject of widespread media attention. For example, the *New York Times* has quoted a tax advisor as "suggest[ing] that taxpayers with * * * home office[s] that * * * meet the new test * * * file amended tax returns for the three years allowed by the statu[t]e of limitations. *Id.* at F-17 (Mar. 11, 1990).

The decision of the court of appeals, if left intact, is thus apt to precipitate a large number of new claims for home office deductions. As Judge Phillips observed, the new standard adopted by the Tax Court and by the court of appeals "requir[es] courts to weigh so many factors that great uncertainty in the application of this critical tax concept is bound to result" (App., *infra*, 10a). In the absence of a decision from this Court resolving the conflict among the courts of appeals, the tax treatment of "home office" deductions will differ from region to region within the country, due solely to the federal circuit in which the taxpayer happens to reside. Resolution of this recurring issue is needed to avoid continuing

[6] For example, any teacher who lacks after-hours access to school facilities might argue that he is entitled to deduct the expenses of maintaining an area at home exclusively used for grading papers, or planning lessons, even though in terms of both time and importance the teaching profession is centered in the classroom and even though only minor incremental costs are incurred in maintaining an office at home.

uncertainty and restore even-handed application of the revenue laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 90-1807

NADER E. SOLIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Argued Feb. 5, 1991

Decided June 5, 1991

Before PHILLIPS, Circuit Judge, CHAPMAN, Senior Circuit Judge, and WILLIAMS, District Judge for the Eastern District of Virginia, sitting by designation.

CHAPMAN, Senior Circuit Judge:

The Commissioner of Internal Revenue ("Commissioner") appeals the decision of the United States Tax Court in favor of plaintiff-appellee Nader E. Soliman ("Soliman"). This appeal presents the single issue [1] of how a taxpayer's "principal place of busi-

[1] The Commissioner also alleged that Soliman underreported his income by improperly deducting several "tax

ness" is established for the purpose of expenses for business use of an office in the home as a deduction for income tax determinations. The Tax Court concluded that Soliman's office in his residence was his principal place of business within the meaning of section 280A of the Internal Revenue Code, 26 U.S.C. § 280A, and that expenses attributable to the office were deductible. We affirm.

I.

Soliman, a self-employed anesthesiologist, operated his medical practice as a sole proprietor until September 1, 1983. Beginning on September 1, 1983, Soliman began operating his practice as a professional services corporation, Nader Soliman, M.D., P.C.

During 1983, Soliman worked as an anesthesiologist at three hospitals: Suburban Hospital in Bethesda, Maryland, Shady Grove Hospital in Rockville, Maryland, and Loudon Hospital in Leesburg, Virginia. He spent approximately thirty (30) to thirty-five (35) hours per week at the hospitals with the majority of such time at Suburban Hospital. None of the hospitals provided an office for Soliman.

Soliman lived in a three-bedroom apartment in McLean, Virginia. He used a spare bedroom as an office, which he furnished with a chair, desk, couch, telephone, answering machine, copier and filing cabinets. In the office he kept patient records, billing records, correspondence with patients, names of surgeons and insurance companies, medical journals, medical texts, collections agency records, and insur-

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seminar" trips to the Virgin Islands and Orlando, Florida. The Tax Court held Soliman liable for these actions, and he did not appeal these findings.

ance code books. In addition to storing these records and materials, Soliman used his office to contact surgeons and patients, and also hospitals to arrange admission of his patients. He performed all of his record keeping in the office, maintaining detailed accounts of billing records and patient logs. He also used the office for reading medical journals to keep abreast of advances in anesthesiology and to prepare for specific patients. Soliman used the office to prepare for his monthly presentations to post-anesthesia care nurses at Suburban Hospital and to study the materials necessary to satisfy his own continuing medical education requirements. In all, Soliman spent two to three hours a day in his home office.

On his 1983 income tax return, Soliman claimed deductions of approximately $2,500 for expenses and depreciation for the home office. On audit, the Commissioner disallowed the deductions finding that they were precluded under section 280A, because his "home office" was not Soliman's "principal place of business" within the meaning of the statute. The tax court disagreed and found that Soliman's home office was his principal place of business.

II

The sole issued presented in this appeal is how a taxpayer's "principal place of business" is determined under Section 280A. Section 162(a) of the IRC (26 U.S.C. § 162(a)) allows a deduction for "all the ordinary and necessary expenses incurred during the taxable year in carrying on any trade or business . . . ." Before the enactment of section 280A, a taxpayer could abuse the section 162(a) deduction by deducting expenses incurred in the maintenance of a "home office," because the Code only required that the home office be "appropriate and helpful."

To close this "loophole," Congress enacted section 280A, which provides that no deduction is allowable "with respect to the use of a dwelling unit which is used by a taxpayer . . . as a residence." However, section 280A(c)(1) allows a home office deduction "to the extent that such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis" (1) as the "principal place of business for any trade or business of the taxpayer," (2) "as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business," or (3) in the case of a "separate structure . . . not attached to the dwelling unit, in connection with the taxpayer's trade or business."

Section 280A does not define "principal place of business," and the tax court formulated a judicial definition by adopting the "focal point" test to evaluate a taxpayer's "principal place of business." The "focal point" is the place where goods and services are provided to customers and revenues are generated. *Baie v. Commissioner*, 74 T.C. 105 (1980). Applying this test, the tax court concluded that Soliman's home could not be his "principal place of business," because the business activities performed at home were "ancillary to the primary income-generating services [Soliman] performed an as anesthesiologist at the hospitals."

Then the Tax Court found that the "focal point," test had been questioned in the past [2] and, it decided

[2] Three circuit court opinions have criticized the "focal point" test. *See Drucker v. Commissioner*, 715 F.2d 67 (2d Cir.1983); *Weissman v. Commissioner*, 751 F.2d 512 (2d Cir. 1984); and *Meiers v. Commissioner*, 782 F.2d 75 (7th Cir. 1986). In each case, the circuit court reversed the tax court's decision against the taxpayer on the taxpayer's claim of a part of his residence as his "principal place of business." Although the courts did not repudiate the "focal point" test, they recognized the potential injustice that the test could create.

to discard the "focal point" test. In its place, the tax court adopted the "facts and circumstances" test which provides that where management or administrative activities are essential to the taxpayer's trade or business and the only available office space is in the taxpayer's home, the "home office" can be his "principal place of business," with the existence of the following factors weighing heavily in favor of a finding that the taxpayer's "home office" is his "principal place of business:" (1) the office in the home is essential to the taxpayer's business; (2) he spends a substantial amount of time there; and (3) there is no other location available for performance of the office functions of the business. Applying this test, the tax court concluded that Soliman's "home office" was his "principal place of business" and that expenses of his office were deductible under section 280A(c)(1).

The Commissioner urges reversal, claiming that the tax court's new test renders section 280A meaningless. The Commissioner contends that the tax court's interpretation of section 280A creates a loophole that every taxpayer, who engages in work related activities at home, will abuse. We find the Commissioner's concern is unfounded.

The tax court's "facts and circumstances" test reflects the same policy that undergirds the IRS's proposed regulation allowing salespersons to deduct home office expenses. The regulation provides that salespersons can deduct expenses from a home office even though they spend most of their time on the road as

long as they spend "a substantial amount of time on paperwork at home." Proposed Income Tax Reg. § 1.280A-2(b)(3), 45 Fed.Reg. 52,399 (Aug. 7, 1980), as amended, 48 Fed.Reg. 33,320 (July 21, 1983).[3] The tax court found that the proposed regulation represented the spirit of section 280A and justified adopting the new test. While it is true that the proposed regulation was not binding on the tax court or this court, the regulation does evince a policy to allow "home office" deductions for taxpayers who maintain "legitimate" home offices, even if the taxpayer does not spend a majority of his time in the office.

We find that the tax court's new "facts and circumstances" test does not eviscerate the requirements of section 280A,[4] but simply replaces the inflexible and potentially unjust "focal point" test. Under the new test, a taxpayer's "principal place of business" will not be determined by only considering which location generates income or client contact, but which location is the true headquarters of the business, as determined by the factors enumerated by the tax court. This test more accurately reflects the purposes and requirements of section 280A, and we affirm it as the law of this circuit.

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[3] Although the regulation was initially proposed in 1980, it is still awaiting final approval by the Commissioner. Under the Commissioner's regulation promulgation procedures, a proposed regulation can lay dormant indefinitely until the Commissioner either withdraws the proposal or adopts a final draft of a proposal as a regulation.

[4] We note that the new test has been applied in four recent cases, and in at least one of these cases, the court has found against the taxpayer. *See In re James R. Shore*, T.C. Memo 1990272, ¶ 90,272 P-H Memo TC (finding against the taxpayer).

III.

For the above reasons, the decision of the tax court is

AFFIRMED.

PHILLIPS, Circuit Judge, dissenting:

The majority affirms the Tax Court's adoption and application of its new "facts and circumstances" test for determining a taxpayer's principal place of business under Internal Revenue Code § 280A. Because I believe the "facts and circumstances" test misconstrues the meaning of § 280A, I respectfully dissent.

Section 280A opens with the "general rule" that "no deduction . . . shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence." 26 U.S.C. § 280A(a). Section 280A(c), however, provides several exceptions to that general rule for certain kinds of "business use." Critical here is the exception that allows deduction to the extent that any portion of a dwelling unit is "used on a regular basis [as] *the* principal place of business for any trade or business of the taxpayer." 26 U.S.C. § 280A(c)(1)(A) (emphasis added). The issue here is narrowly and simply whether Soliman's home office use came within this "principal place of business" exception.

Adopting the Tax Court's new "facts and circumstances" test as the law of this circuit, the majority concludes that a home office can be a taxpayer's "principal place of business" if "management or administrative activities are essential to the taxpayer's trade or business and the only available office space is in the taxpayer's home." At 54. Because Soliman's home office was essential to his business, he spent a

substantial amount of time there, and there was no other location where he could perform the office functions of his business, the Tax Court found and the majority agrees that Soliman's home office was his "principal place of business."

I disagree with this approach. Under the plain language of § 280A(c)(1)(A), a taxpayer can only have one "principal place of business." *See Pomarantz v. Commissioner*, 867 F.2d 495, 496 (9th Cir.1988). Section 280A does not in terms allow a taxpayer to deduct home office expenses any time those expenses are essential to his business. As the dissenting judges in the Tax Court's decision point out, the "facts and circumstances" test eliminates any need for comparing a taxpayer's use of several business locations to determine which constituted his "principal place of business." *See Soliman v. Commissioner*, 94 T.C. 20, 33, 35 (1990) (Nims, J., dissenting) and (Ruwe, J., dissenting). They thought, and I agree, that the term "principal place of business" compels an inquiry directed to that specific question—which is the *one* that is "principal." Otherwise Congress could have used language such as "essential place of business" or "necessary place of business."

All three of the cases relied on by the majority in which circuit courts have concluded that a taxpayer's home office was his "principal place of business" are distinguishable from Soliman's case. Unlike this case, they involve situations where the taxpayer spent the majority of his time in his home office, or did his most important work there, or both. *See Meiers v. Commissioner*, 782 F.2d 75, 79 (7th Cir.1986) (taxpayer "spent most of her time in the home office and performed what may be her most important functions as a manager there"); *Weissman v. Commissioner*, 751 F.2d 512, 516 (2d Cir.1984) (taxpayer

spent 80% of his work time in his home office); and *Drucker v. Commissioner*, 715 F.2d 67, 69 (2d Cir. 1983) ("[b]oth in time and in importance, home practice was the 'focal point' of. the appellant musicians' employment-related activities."). In each of these decisions, the circuit court compared business locations to see which one qualified as the principal place of business. As the dissenting Tax Court judges in this case both recognized, those decisions actually provide more proper tests for locating the principal place of business than does the amorphous "facts and circumstances" test. Chief Judge Nims proposed a "time and importance" modification of the "focal point" test. Under it the courts would continue to apply the "focal point" test—which defines the "focal point" as the place where the taxpayer provides goods and services and generates revenue—except "in the rare situation where in time and importance the home office itself became the focal point of the taxpayer's activities." *Soliman v. Commissioner*, 94 T.C. 20, 32 (1990) (Nims, J., dissenting). Judge Ruwe suggested a test under which a taxpayer's principal place of business would be "the place where the dominant portion of the taxpayer's work is accomplished." *Id.* at 41 (Ruwe, J., dissenting). With those dissenting judges, I believe that either of these tests is more consistent with the meaning of § 280A(c)(1)(A) than is the Tax Court's new, more open-ended one.

It is undisputed that Soliman does not spend the majority of his time at his home office. He also does not do his most important work—treating patients—at his home office. Although Soliman's home office work is essential to his business, this should not mandate a finding that the home office is his principal place of business. In a quite similar case, the Ninth Circuit recently concluded that an emergency care

physician's home office was not his "principal place of business" under § 280A. *See Pomarantz v. Commissioner*, 867 F.2d 495 (9th Cir.1988). The Ninth Circuit ruled that Pomarantz could not deduct home office expenses because

> he consistently spent more time on duty at the hospital rather than at home. The essence of his profession is the hands-on treatment of patients which he did only at the hospital and never at home. Finally, he generated income only by seeing patients at the hospital not study or writing at home.

Id. at 497-98. I would apply this very reasoning to find that Soliman's home office was not his principal place of business.

In sum, I would not adopt the "facts and circumstances" test as the law of of this circuit. It avoids what I think a fair application of § 280A(c)(1)(A) flatly compels: a comparison of the uses of multiple business locations to determine which is *the* principal place of business of a taxpayer. It does so by requiring courts to weigh so many factors that great uncertainty in the application of this critical tax concept is bound to result. Cf. *Cadwallader v. Commissioner*, 919 F.2d 1273, 1275 (7th Cir.1990) (noting "vagaries" of the " 'all relevant factors' laundry list" used by the Tax Court in *Soliman*). Because Soliman spends the majority of his time and does his most important work away from his home office, I would reverse.[5]

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[5] The majority cites Proposed Income Tax Reg. § 1.280A-2(b)(3), 45 Fed.Reg. 52399 (Aug. 7, 1980), as amended, 48 Fed.Reg. 33320 (July 21, 1983), in support of its decision. As the majority recognizes, this proposed regulation is not binding precedent on the Tax Court or this court. Moreover, the proposed example the majority cites from the regulation specifically applies to "outside salesperson[s]" who do not spend any large portion of their time in one particular location. Although these salespersons spend more time on the road than in their home offices, they may spend more time at their home offices than in any one particular place that they sell goods. Soliman, in addition to spending the majority of his time at the hospital, spent more time at one of the three hospitals, Suburban Hospital, than he spent at his home office. Thus, his home office is not the base for his business in the same way that it would be for a salesperson.

APPENDIX B

94 T. C. No. 3

UNITED STATES TAX COURT

Docket No. 35698-87

NADER E. SOLIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed January 18, 1990

P used a room in his apartment exclusively to manage his medical practice. He had no other office space available to him. His business activities at his home office were essential to his medical practice but were ancillary to the primary income-generating services he performed at hospitals.

Held, P is entitled to deduct expenses for his home office. We will no longer follow the "focal point" test of *Drucker v. Commissioner*, 79 T.C. 605 (1982), revd. 715 F.2d 67 (2d Cir. 1983) in cases in which a taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business. *Held further*, other deductions disallowed. *Held further*, P is liable for additions to tax.

David M. Sokolow, for the petitioner.

Karen E. Chandler, for the respondent.

WILLIAMS, *Judge*: The Commissioner determined a deficiency in petitioner's 1983 Federal income tax as follows:

	Deficiency	section 6651(a)(1)[1]	section 6653(a)(1)	section 6653(a)(2)	section 6661
1983	$20,338	$1,089	$2,538	*	$3,864

* 50% of the interest due on the underpayment.

The issues we must decide are: (1) whether petitioner is entitled to a home office deduction pursuant to section 280A, (2) whether petitioner is entitled to a business expense deduction for the use of his automobile, (3) whether petitioner is entitled to a deduction for expenses incurred in traveling to the Virgin Islands and Orlando, Florida, and (4) whether petitioner is liable for additions to tax as determined by respondent. Petitioner conceded the section 6651(a)(1) addition to tax prior to trial.

FINDINGS OF FACT

Some of the facts in this case have been stipulated and are so found. Petitioner resided in McLean, Virginia at the time the petition was filed in this case. Petitioner, a self-employed anesthesiologist, was a sole proprietor until September 1, 1983. He incorporated Nader Soliman, M.D., P.C., on August 6, 1983, which began its first fiscal year on September 1, 1983.

During 1983 petitioner worked as an anesthesiologist at Suburban Hospital, in Bethesda, Maryland, Shady Grove Hospital in Rockville, Maryland, and Loudoun Memorial Hospital in Leesburg, Virginia. Petitioner earned income in 1983 by administering anesthesia to patients before surgery, caring for patients immediately after surgery, and treating patients for pain. Petitioner performed all of these

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[1] All section references are to the Internal Revenue Code of 1954 as in effect for the year in issue, unless otherwise indicated.

services in the hospitals where he was on staff. Petitioner spent 30 to 35 hours per week at the hospitals. He spent approximately 80 percent of that time at Suburban Hospital, and he spent most of the remaining time at Loudoun Memorial Hospital. Petitioner was not provided an office at any of the three hospitals.

During 1983 petitioner lived in a three-bedroom apartment in McLean, Virginia. He used one bedroom as an office where he kept the following: chair, desk, couch, telephone, answering machine, copier, filing cabinet, patient records, billing records, correspondence with patients, names of surgeons and insurance companies, medical journals, medical texts, collection agency records, and insurance code books. In his office petitioner contacted surgeons and patients by telephone, contacted hospitals to arrange admission for his own patients, maintained detailed billing records and patient logs, transmitted this information to a billing service, recorded collected payments on the patient logs, read medical books and journals, and prepared for specific patients. Petitioner also satisfied his continuing medical education requirements and prepared for his monthly presentations to post-anesthesia care nurses at Suburban Hospital in his office at home. Petitioner spent an average of 2 to 3 hours a day working in his home office but never treated patients there. Petitioner's only "personal" use of his home office was to balance his checkbook which combined his business and personal affairs.

Petitioner deducted on Schedule C of his 1983 Federal income tax return home office expenses and depreciation in the amount of $841 for the first 8 months of 1983. Petitioner claimed Schedule E home office deductions for expenses and depreciation in the

amount of $418 for the last months of 1983. Respondent disallowed petitioner's home office deduction.

During 1983 petitioner owned two automobiles, a Buick and a Honda. Petitioner drove the Buick exclusively on trips between his home office and the hospitals, between the hospital, and between the hospitals and hotels where he stayed when he was on call. In 1983, petitioner drove his Buick a little over 10,000 miles. Petitioner incurred and claimed on his 1983 Federal income tax return automobile expenses in driving his Buick between hospitals and between his home office and hospitals of $1,014 during the first 8 months of 1983, and $508 during the last 4 months of 1983. Petitioner also claimed a depreciation deduction for his Buick of $2,236. Respondent disallowed petitioner's depreciation and automobile expense deduction.

In June of 1983, petitioner and his wife attended a seminar in the U.S. Virgin Islands emphasizing tax-saving techniques and tax shelters. Petitioner's 3-year old son accompanied them on their trip. Petitioner attended the seminar from June 26 to June 29, 1983. Time spent at the seminar included picking up registration materials the first day, approximately 15 hours of seminars over the next 3 days and a free consultation. Petitioner left the Virgin Islands on July 4, 1983, after spending 10 days there. On his 1983 Federal Income tax return petitioner deducted his wife's and his round-trip airfare to the Virgin Islands and their hotel and meal expenses on days when petitioner had any contact with the seminar as follows: seminar fee—$498; meals—$376; airfare—$1,158; hotel—$394.

On August 19, 1983, petitioner, his wife, and 3-year old son flew from Washington, D.C. to Orlando,

Florida for an additional tax and financial planning consultation. As a result, petitioner was sent an investment proposal. Petitioner was advised by his accountant, however, that the investment was a sham tax shelter. Consequently, petitioner did not invest in the tax shelter. Petitioner claimed as a deduction on his 1983 Federal income tax return the expenses of his trip to Orlando, Florida as follows: consultation fee—$1,250.00; hotel—$60.46; airfare—$554.00. Petitioner's trips to the Virgin Islands and Orlando, Florida during 1983 were primarily for personal reasons.

In the Statutory Notice of Deficiency, respondent determined that petitioner had understated his gross receipts on his U.S. Individual Income Tax Return in the amount of $31,219. One thousand three hundred and sixty-two dollars of the unreported gross receipts were amounts collected and subsequently refunded to insurance providers which respondent concedes are not taxable. Seventeen thousand four hundred and twenty-five dollars of the unreported gross receipts are amounts paid prior to September 1983 for services provided by petitioner which were not reported on his U.S. Individual Income Tax Return or on the U.S. Corporate Income Tax Return of Nader Soliman, M.D., P.C. Twelve thousand four hundred and thirty-two dollars of the unreported gross receipts represents amounts collected prior to September 1983 for services provided by petitioner which should have been reported on his U.S. Individual Income Tax return but were, instead, reported on the U.S. Corporation Income Tax Return of Nader Soliman, M.D., P.C. Petitioner has conceded the taxability of $29,857 of the gross receipts.

OPINION

The first issue we must decide is whether petitioner is entitled to a deduction for his home office pursuant to section 280A. Section 280A provides generally that expenses in connection with the use of a taxpayer's residence are not deductible. An exception to the general rule, section 280A(c)(1)(A), permits the deduction of home office expenses if a portion of the home is "exclusively used on a regular basis" as the principal place of business for any trade or business of the taxpayer. An employee must also show that the office is maintained "for the convenience of his employer." Sec. 280A(c)(1). Petitioner argues that as a practicing anesthesiologist without any other office, his home office was his principal place of business.

Prior to the enactment of section 280A, we allowed a deduction for an "ordinary and necessary" home office expense pursuant to section 162(a) if the expense was "appropriate and helpful." See, e.g., *Newi v. Commissioner*, 432 F.2d 998, 1000 (2d Cir. 1970), affg. a Memorandum Opinion of this Court. Congress curtailed this liberal allowance of home office expense deductions by enacting section 280A. See *Green v. Commissioner*, 707 F.2d 404, 407 (9th Cir. 1983), revg. 78 T.C. 428 (1982). Congress intended to prevent a deduction for essentially personal expenses and allow a deduction only for business use of residences. S. Rept. 94-938 (1976), 1976-3 C.B. (Vol. 3) 49, 185; see *Drucker v. Commissioner*, 715 F.2d 67, 69 (2d Cir. 1983), revg. 79 T.C. 605 (1982).

We believe, and respondent does not seriously contend otherwise, that petitioner used one room in the apartment exclusively on a regular basis in his business. The issue, therefore, is whether the home office was petitioner's principal place of business. We have

applied the "focal point" test to identify the taxpayer's principal place of business. *Baie v. Commissioner*, 74 T.C. 105 (1980). The "focal point" of the taxpayer's activities, and thus his principal place of business, is the place where goods and services are provided to customers and revenues are generated. *Drucker v. Commissioner*, 79 T.C. at 613-614; *Baie v. Commissioner*, *supra* at 109.

We have consistently followed *Baie* and the "focal point" test. See, e.g., *Drucker v. Commissioner*, 79 T.C. at 612; *Green v. Commissioner*, 78 T.C. at 433; *Jackson v. Commissioner*, 76 T.C. 696, 700 (1981). Courts of Appeals, however, have questioned our test. See *Meiers v. Commissioner*, 782 F.2d 75 (7th Cir. 1986), revg. a Memorandum Opinion of this Court; *Weissman v. Commissioner*, 751 F.2d 512 (2d Cir. 1984), revg. a Memorandum Opinion of this Court; *Drucker v. Commissioner*, 715 F.2d 67 (2d Cir. 1983), revg. 79 T.C. 605 (1982). In light of this response, we believe we need to revisit the "focal point" test and our interpretation of section 280A for cases in which administration of the taxpayer's business is essential and the only available office space is in the taxpayer's home.

The "focal point" test looks only to the place where services are performed and income is generated. Under this test, petitioner's home office is not the "focal point" of his business. His business activities at the house were essential to his medical practice but were ancillary to the primary income-generating services petitioner performed as an anesthesiologist at the hospitals. We believe, however, that where a taxpayer's occupation requires essential organizational and management activities that are distinct

from those that generate income, the place where the business is managed can be the principal place of business.

Congress provided exceptions to the restrictions of section 280A by allowing deductions for a home office if either the home office is the taxpayer's principal place of business, section 280A(c)(1)(A), or it is used for meeting with the taxpayer's patients, clients, or customers in the taxpayer's business, section 280A(c)(1)(B). Goods and services could be transferred to customers and clients in the taxpayer's home, the "focal point," only if the taxpayer meets clients or customers in his home. The "focal point" test, therefore, merges the "principal place of business" exception with the "meeting clients" exception and practically eliminates the principal place of business exception from section 280A. See *Drucker v. Commissioner*, 79 T.C. at 623 (Wilbur, J., dissenting). If the "principal place of business" exception has meaning independent of the exception for home offices used to meet clients or patients then the "focal point" test should give way to an analysis of all the facts and circumstances.

The determination of "principal place of business" necessarily depends on the facts and circumstances of each case. A principal place of business is not necessarily where goods and services are transferred to clients or customers but is frequently the administrative headquarters of a business. Furthermore, where no other suitable office is provided for essential organizational activities of a business, the fact that goods or services are delivered elsewhere should not per se require a conclusion that a home office is other than the principal place of business. The inquiry is ap-

propriately into the surrounding facts and circumstances. See *Weissman v. Commissioner, supra.*

The time spent in the home office is one of several important factors to consider, but it is not necessarily the predominant factor. See *Meiers v. Commissioner*, 782 F.2d at 79. This is an especially important point for a business such as petitioner's that, to be successful, has different activities, one that is typically suited to office work and one that is not. Petitioner's business required him to perform two very different functions: (1) to render medical services at hospitals, and (2) to care for administrative chores, e.g., record keeping, gathering of billing information and payments, continuing medical education. Both functions were equally essential to a successful medical practice; the second required an office while the first did not. Petitioner's business required him to devote substantial time to office chores, and, although he spent more hours at the hospitals, we believe that comparing the number of hours spent at each location is a misleading comparison because the activities are so different from each other. Such a comparison can be meaningful if the activities in the home office are similar to the activities at another place of business. E.g., *Drucker v. Commissioner, supra.* We believe *Weissman v. Commissioner, supra* at 514, is instructive on this point. In *Weissman* a professor had two offices: one in his home and one on campus. In deciding that his home office was his principal place of business, the Court of Appeals compared the number of hours that he spent at the home office to the number of hours he spent at the campus office. Based on time spent at his home office, the Court of Appeals permitted him deductions for maintaining his home office because it was the most important office for his business. Because the taxpayer had more than one office, the time spent at each office became the deciding factor. If such a comparison were the determining standard, however, it would preclude the deduction approved of by the Secretary in his proposed regulations. Sec. 1.280A-2(b)(3), Proposed Income Tax Reg., 45 Fed. Reg. 52399 (Aug. 7, 1980), as amended 48 Fed. Reg. 33320 (July 21, 1983). The proposed regulations recognize that "if an outside salesperson has no office space except at home and spends a substantial amount of time on paperwork at home, the office in the home may qualify as the salesperson's principal place of business." The proposed regulations do not require more time to be spent in the home office than on the road. Any successful outside salesperson is not going to spend more time in his office than outside selling. The proposed standard is spending "a substantial amount of time on paperwork at home." We agree with this standard if the taxpayer has no other available facility to accomplish the administrative chores of his business.

In *Pomarantz v. Commissioner*, 847 F.2d 495 (9th Cir. 1988), affg. T.C. Memo. 1986-461, the Court of Appeals sustained our decision disallowing a deduction for home office expenses on facts superficially similar to those in the present case. The taxpayer in *Pomarantz* was an emergency room physician who provided his services to a hospital as an independent contractor. The hospital did not provide him with office space, and he used a room in his home exclusively as an office. Reasoning that the taxpayer spent more hours and performed more important activities at the hospital, we held that under any standard, the taxpayer's home office was not his principal place of business. T.C. Memo. 1986-461. Deferring to this

Court under a clearly erroneous standard, 867 F.2d at 497, the Ninth Circuit affirmed our holding that under either the focal point test or the facts and circumstances test, the hospital was the taxpayer's principal place of business. We reach a different conclusion in this case because the taxpayer in *Pomarantz* spent an insubstantial amount of time in his home office. By contrast, in this case, petitioner's practice required that he spend a substantial amount of his time, over 30 percent, working in his home office. In weighing the factors in this case, we believe that this difference is significant and requires a different conclusion about petitioner's principal place of business.

Some other important factors that must be considered are the business exigencies for having a home office, whether the functions performed in the home office are essential to the conduct of business, whether the office is suitable for the essential business functions performed there, and the appropriateness of the furnishings. While proposed regulations have no force or effect, they do state a considered position by respondent. We note again that respondent's considered position is in accord with this view.

In this case, the activities petitioner performed in his home office, viz, bookkeeping, billing, preparation for patients, and continuing medical education, were distinct from those he performed at the hospital. He maintained patient records, billed patients, collected and recorded payments, and reviewed medical procedures. These activities were essential to petitioner's work. In order to carry on his business as an anesthesiologist, it was essential for petitioner to keep abreast of the latest technology, to bill his patients, and to maintain his state certification as an anesthesiologist.

The hospitals did not provide petitioner with office space. Petitioner's case is distinguishable from cases, therefore, where a taxpayer's employer provided adequate office space outside the home. See *Sharon v. Commissioner*, 66 T.C. 515, 525 (1976), affd. per curiam 591 F.2d 1273 (9th Cir. 1978). Petitioner managed and coordinated his anethesiology work in his home office. He spent approximately 30 percent of his time in his home office. In addition to spending substantial time there, petitioner's use of the home office was important to a successful medical practice. In this case, however, petitioner had no place to manage his medical practice other than in his home. Compare *Weissman v. Commissioner, supra.*

Balancing the factors, we believe that the lack of any other office weighs significantly in petitioner's favor. Because administrative functions must be performed, we cannot simply tote up the number of hours he spent at his office and at the hospital and on the basis of where he spent more time conclude that was his principal place of business. His time in the office was substantial, and because his office activities were distinct from his medical activities at the hospital and were essential to a successful practice, we weigh more heavily in our consideration the lack of alternative office space than a mechanical comparison of the number of hours spent there.

Petitioner's practice as an anesthesiologist, in effect, was headquartered in his home office. Section 280A was not enacted to compel a taxpayer to rent office space rather than work out of his own home. See *Meiers v. Commissioner*, 782 F.2d at 79. We believe that Congress intended to allow a deduction for this type of home office expense when it enacted section 280A. We hold that petitioner's home office was his

principal place of business, and we will no longer follow our opinion in *Drucker v. Commissioner*, *supra*, in cases in which a taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business.[2]

For the last 4 months of 1983, after petitioner incorporated, he must also show that he maintained the home "for the convenience of his employer." Sec. 280A(c)(1). Petitioner had no other office space available, his business activities there remained unchanged and were essential to his professional corporation's business. Maintaining the home office was a business necessity, and, therefore, was "for the convenience of his employer." See *Drucker v. Commissioner*, 715 F.2d at 70.

The next issue we must decide is whether petitioner may claim a deduction for expenses and depreciation arising from the use of his automobile. Petitioner claimed a deduction for all expenses and depreciation based on total business usage of his Buick. The parties agreed that petitioner is entitled to deduct $1,522 in expenses and $2,236 of depreciation if we hold that his home office is his principal place of business. Because we have held that petitioner's home office is his principal place of business, petitioner may deduct the expenses and depreciation.

We must next determine whether petitioner may deduct expenses in attending a seminar in the U.S. Virgin Islands and a consultation in Orlando, Florida. Petitioner argues that he is entitled to a deduction for these expenses pursuant to section 212.

[2] The parties do not discuss the restrictions of section 280A(c)(5), and we assume they agree that the restrictions have no effect on the amounts petitioner may deduct for his home office.

Section 212 provides for the deduction of all ordinary and necessary expenses incurred for the production or collection of income or for the management, conservation, or maintainence of property held for the production of income, or in connection with the determination, collection or refund of any tax. To be deductible pursuant to section 212, expenses must be reasonable in amount and "must bear a reasonable and proximate relation to the production or collection of taxable income or to the management, conservation, or maintenance of properties held for the production of income." Sec. 1.212-1(d), Income Tax Regs. Petitioner points to his purchase of life insurance and the incorporation of his practice as results of his trips to the Virgin Islands and Orlando, Florida. It remains unclear, however, how the trips bear any reasonable relationship to petitioner's need for advice on financial planning. Judging from the evidence before us, we believe that petitioner's trips were predominantly personal family vacations. Consequently, we hold that those expenses are not deductible.

The next issue we must decide is whether petitioner is liable for additions to tax pursuant to sections 6653(a)(1) and (a)(2). Section 6653(a)(1) provides that if any part of any underpayment of tax is due to negligence or intentional disregard of rules or regulations, there shall be added to the tax an amount equal to five percent of the underpayment. Section 6653(a)(2) provides for an additional negligence addition in an amount equal to 50 percent of the interest payable on the portion of the underpayment that is attributable to negligence. For purposes of section 6653(a), negligence is defined as lack

of due care or failure to do what a reasonable and prudent person would do under the circumstances. *Neely v. Commissioner*, 85 T.C. 934, 947 (1985). Petitioners have the burden of proof on this issue. Rule 142(a), Tax Court Rules of Practice and Procedure.

Petitioner failed to report $29,857 of his taxable income, $12,432 of which was reported on petitioner's corporation's return and $17,425 of which was completely omitted. Petitioner kept books and records and consulted his accountant on tax matters. We believe that his careless omission of this income from his Federal income tax was due to negligence. It does not appear, however, that any other portion of petitioner's underpayment is due to negligence. Petitioner claimed deductions that were well-grounded in fact and supportable under the law. While we have sustained part of respondent's disallowance, petitioner's taking the deductions was not negligent.

Finally, we must determine if petitioner is liable for an addition to tax pursuant to section 6661. Section 6661 provides for an addition to tax of 25 percent of the amount of underpayment of tax attributable to a "substantial understatement of income tax." A substantial understatement of tax exists if the taxpayer, without substantial authority or adequate disclosure of facts, has understated his tax liability by the greater of $5,000 or 10 percent of the tax required to be shown on the return. Sec. 6661(b)(1)(A). The understatement is reduced by so much of it as is based on a position supported by substantial authority or is attributable to facts adequately disclosed on the return. Sec. 6661(b)(2)(B).

It appears that there is or was substantial authority or adequate disclosure of all matters in dispute except for petitioner's unreported income of $29,857.

Petitioner's return shows a tax liability of $30,413. The tax required to be shown on the return is yet to be computed, but it would appear to be approximately $45,000. Petitioner is, therefore, liable for the addition on his understatement of income tax that is attributable to his unreported income because this understatement appears to exceed the greater of $5,000 or 10 percent of the tax required to be shown on his return.

Decision will be entered pursuant to Rule 185.

Reviewed by the Court.

KÖRNER, HAMBLEN, COHEN, SWIFT, JACOBS, GERBER, WRIGHT, WELLS, WHALEN, and COLVIN, *JJ.*, agree with the majority opinion.

NIMS, *C.J.*, dissenting: With deference to the judgment of a majority of my colleagues, I am unable to detect any reliable basis for determining a taxpayer's principal place of business in the absence of applying the focal point test (modified as discussed below) first enunciated in *Baie v. Commissioner*, 74 T.C. 105 (1980), and thereafter consisistently applied by this Court. In that case we said the following: "We therefore take it that what Congress had in mind [as to a taxpayer's "principal place of business"] was the focal point of a taxpayer's activities * * *." 74 T.C. at 109.

To paraphrase a statement by Judge Ruwe in his companion dissenting opinion, the appellate court opinions in the three cases in which this Court has been reversed for having inappropriately applied the focal point test make it apparent that the single most important factor relied upon by these Courts of Appeals was that the taxpayer spent the majority of his or her business time at the "home office," rather than at the place where goods or services were provided to customers or clients or where income is produced. To that I would simply add that the Courts of Appeals also stressed the importance of the work performed at home. See *Meiers v. Commissioner*, 782 F.2d 75, 78 (7th Cir. 1986), revg. T.C. Memo. 1982-51; see also *Drucker v. Commissioner*, 715 F.2d 67 (2d Cir. 1983), revg. 79 T.C. 605 (1982); and *Weissman v. Commissioners*, 751 F.2d 512 (2d Cir. 1984), revg. T.C. Memo. 1983-724.

It seems to me that each of the above cases involved the *Drucker* case's "rare situation" where, on the unusual facts presented, the taxpayer's principal place of business was not that of his employer because, in time and importance, the office in the home was the

true focal point, and therefore the principal place, of the taxpayer's business. See *Drucker v. Commissioner*, 715 F.2d at 69. Thus, in order to maintain a reference point from which to determine the principal place of business, I would preserve the focal point test, modified to the extent necessary in the rare situation where in time and importance the home office itself became the focal point of the taxpayer's activities.

The majority holds that to make the determination of principal place of business "the inquiry is appropriately into the surrounding facts and circumstances." (Majority op. p.10.) But as we stated in *Baie v. Commissioner*, 74 T.C. at 108, "*Prior to the enactment of section 280A*, this Court had allowed a deduction for an office in an employee's residence on the grounds that the maintenance of such office was 'appropriate and helpful' *under the circumstances.*" (Emphasis supplied.) Thus, the reintroduction of a facts and circumstances inquiry takes us all the way back to square one; i.e., to the situation which existed even before Congress took what it thought would be the remedial action of section 280A.

The focal point test has been our response to the Congress' use of the word "principal" in the statutory phrase "principal place of business." At the least, the statutory phrase requires us to compare the putative principal place with other places that might be principal places and, using some standard, determine whether the putative principal place ranks higher than the other places. The majority's approach does not seek to make such a comparison. The majority seems to examine into the importance of petitioner's office in the home, but do not examine whether that importance is greater than the importance of, say,

the hospital facilities in which petitioner delivers his anesthesiology services. As Judge Ruwe points out, the majority does not even examine into whether petitioner spent more time in his office in the home than in the hospital facilities. In effect, the majority has substituted the phrase "important place of business" for the phrase that the Congress enacted.

Since on the facts it is indisputable that Dr. Soliman's activities do not meet the unglossed focal point test, nor do they appear to meet the "time and importance" modification of the focal point test introduced by the Court of Appeals cases, I would hold for respondent on the principal place of business issue.

CHABOT, PARKER, CLAPP, and PARR, *JJ.*, agree with this dissent.

RUWE, *J.*, dissenting: I respectfully disagree with the majority's conclusion that petitioner is entitled to a home office deduction under section 280A.

Section 280A generally denies deductions related to a home office unless certain conditions are met. The condition in question in this case is whether petitioner's home office was his "principal place of business" within the meaning of section 280A(c)(1)(A). It is clear that a taxpayer can have only one principal place of business for each business in which he is engaged. *Pomarantz v. Commissioner*, 867 F.2d 495, 496 (9th Cir. 1988), affg. T. C. Memo. 1986-461; *Drucker v. Commissioner*, 79 T.C. 605, 612 (1982), revd. on other grounds 715 F.2d 67 (2d Cir. 1983).

The majority ostensibly overrules the "focal point" test for determining a taxpayer's principal place of business. It does so on the basis of cases decided by the Second and Seventh Circuit Courts of Appeals which reversed opinions of this Court. I agree that the "focal point" test, as previously applied by this Court, can place undue emphasis on where the taxpayer's activities are most visible, where he physically meets and deals with customers, and where goods and services are ultimately exchanged for income.[1] Nevertheless, when a taxpayer has two or more places of conducting business it is incumbent upon us to specify a standard which can be applied in determining which is the principal place of business.

The circuit courts that have rejected the "focal point" test have held that a taxpayer's principal place

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[1] In many cases the "focal point" test will produce the same result as the other test which has been used by the Courts of Appeals. See *Pomarantz v. Commissioner*, 867 F.2d 495 (9th Cir. 1988), affg. T. C. Memo. 1986-461.

of business for purposes of section 280A is "the place where the dominant portion of his work is accomplished." *Weissman v. Commissioner*, 751 F.2d 512, 514 (2d Cir. 1984), revg. a Memorandum Opinion of this Court; *Meiers v. Commissioner*, 782 F.2d 75, 78-79 (7th Cir. 1986), revg. a Memorandum Opinion of this Court. I agree that this is the appropriate test. The majority, however, does not adopt this test. In fact, nowhere in the majority opinion is this test even mentioned.

The majority opinion sets forth various factors to be considered in making its determination. However, the majority fails to use these factors to *compare* petitioner's several places of business in order to determine where "the dominant portion of his work is accomplished." Instead, the majority simply concludes that when "a taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business" (majority op. p.16), then the home office is the principal place of business. The majority eliminates the need to compare the importance of home office activities with the importance of activities at the other place of business or to compare the amount of time spent at the home office with the amount of time spent at the other place of business. Indeed, the majority eliminates the need to determine where "the dominant portion of [the taxpayer's] work is accomplished." In doing so, the majority takes the highly unusual step of overruling precedent in this Court on the basis of appellate court opinions and then disregarding the test articulated in those same appellate court opinions.

In the three appellate court opinions in which this Court has been reversed for having applied a "focal

point" test, it is obvious that a major factor relied upon by the circuit courts was the amount of time that the taxpayer spent at his various places of business. In *Drucker v. Commissioner*, *supra*, there was a factual finding that the taxpayer-musician spent the majority of his working hours in his home studio. In *Weissman v. Commissioner*, *supra*, it was found that the college professor spent 80 percent of the time devoted to his business in his home office. Finally, in *Meiers* v. *Commissioner*, *supra*, the taxpayer spent two-thirds of her business time in her home office. In *Meiers*, we held that the time spent at various business locations was not controlling, but instead, focused on the place where goods and services were provided to customers. *Meiers v. Commissioner*, T. C. Memo. 1984-607. In commenting on this, the Seventh Circuit stated that "we think a major consideration ought to be the length of time the taxpayer spends in the home office as opposed to other locations." *Meiers v. Commissioner*, 782 F.2d at 79. The facts clearly show that in the instant case petitioner did not spend most of his business time at his home office.: Instead, petitioner devoted most of his business time to practicing medicine at Suburban Hospital.

The majority acknowledges that in *Weissman v. Commissioner*, *supra*, the Second Circuit considered the amount of time spent at the home office *compared* with the amount of time spent on campus [2] to be the

[2] The majority incorrectly says that the comparison was between the hours "spent at the home office" as opposed "to the number of hours * * * spent at the *campus office*." (Majority op. p. 11. Emphasis added.) The facts show that Professor Weissman spent very little of his campus time at the campus office. Both this Court and the Second Circuit compared home office time with *total* time spent on campus in-

deciding factor (majority op. pp. 11 and 12). The majority states that "Such a comparison can be meaningful if the activities in the home office are similar to the activities at another place of business. * * *" (Majority op. p. 11.) The majority infers that Professor Weissman's campus activities were similar to those at his home office. The activities performed by Professor Weissman on campus and at his home office were not similar. The heart of the context in *Weissman v. Commissioner*, *supra*, both in our opinion and in that of the Second Circuit, was that the taxpayer's campus activities, including those at his campus office, were exclusively concerned with Professor Weissman's classroom work ("where he taught, met with students, graded examinations, and prepared lectures. * * *" *Weissman v. Commissioner*, 751 F.2d at 514), whereas his home office activities were exclusively related to research and writing. The Second Circuit's only disagreement with our opinion was with respect to the relative importance of the *different* types of activities conducted on campus and at home. That is obviously why the court criticized our "focal point" test for placing undue emphasis on classroom activities. *Weissman v. Commissioner*, 751 F.2d at 514.[3]

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cluding classroom time, consultation with students, and time spent in the campus library. *Weissman v. Commissioner*, T. C. Memo. 1983-724, affd. 751 F.2d 512 (2d Cir. 1984).

[3] "In the case of educators, the focal point approach does not always adequately distinguish between individuals with *very different* employment activities." *Weissman v. Commissioner*, 751 F.2d at 514. (Emphasis added.) The same approach was taken in *Meiers v. Commissioner*, 782 F.2d 75 (7th Cir. 1986), revg. a Memorandum Opinion of this Court. The Seventh Circuit clearly found that Mrs. Meiers' activities

The majority states that "If such a comparison [time spent at different places of business] were the determining standard, however, it would preclude the deduction approved of by the Secretary in his proposed regulations." (Majority op. p. 12.) The *proposed* regulations, cited by the majority, say that an outside salesman's home office *may* qualify as his principal place of business. The home office of an outside salesman, who spends most of his time visiting many different customers at different locations, might be his principal place of business in comparison with any other place. That situation has nothing to do with the facts in this case, and it is inappropriate to try to anticipate application of *proposed* regulations to facts that are not before this Court. In any event, it would be error to reject the test adopted by the Circuit Courts of Appeals because of a *proposed* regulation. Proposed regulations are not entitled to judicial deference. *Natomas North America, Inc. v. Commissioner*, 90 T.C. 710, 718 n.11 (1988); *North Ridge Country Club v. Commissioner*, 89 T.C. 563, 579-580 (1987), revd. on other grounds 877 F.2d 750 (9th Cir. 1989); *Laglia v. Commissioner*, 88 T.C. 894, 897 (1987); *Scott v. Commissioner*, 84 T.C. 683, 690 (1985); *F. W. Woolworth Co. v. Commissioner*, 54 T.C. 1233, 1265-1266 (1970).

The amount of time spent at the home office, while of major importance, is not necessarily the only consideration. Another is the importance of the business functions performed by the taxpayer in the home office. *Meiers* v. *Commissioner*, 782 F.2d at 79; *Weiss-*

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at her home office and at the laundry were different, but of equal importance. Time spent at the respective places of business thus became the deciding factor. *Meiers v. Commissioner*, 782 F.2d at 79.

man v. *Commissioner*, 751 F.2d at 515; *Drucker* v. *Commissioner*, 715 F.2d at 69. Petitioner's business was being an anestheologist. He administered to patients at the hospital and never met patients at his home office. His use of the home office to read medical journals, arrange his schedule, and perform billing activities was no doubt essential to his medical practice. However, if one were to rank the importance of those activities against the actual performance of medical services that took place exclusively during the 30 to 35 hours that he spent each week at the hospitals (24 to 28 at Suburban), there is no question that his hospital based activities were more important to his anestheology practice than his home office activities. In all the aforementioned appellate court opinions wherein this Court was reversed, there was a specific qualitative determination that the home office activities were at least as important to the taxpayer's business as the activities performed away from the home office. The new test adopted by the majority makes no provision for weighing the relative importance of petitioner's hospital activities versus his home activities.[4]

Even if we were to find that petitioner's home office activities and his treatment of patients were of equal importance to his medical practice, existing precedent

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[4] The majority describes petitioner's home office activities as "essential to his medical practice but * * * *ancillary* to the primary income generating services petitioner performed as an anesthesiologist * * *." (Majority op. p. 9.) (Emphasis added.) The word "ancillary" is most often used to describe something that is subordinate to that which is principal or primary. Webster's Third International Dictionary (Unabridged) (1986); see Black's Law Dictionary, pp. 78, 79 (5th ed. 1979).

would still require us to decide which place of business was the one where "the dominant portion of his work is accomplished." *Weissman v. Commissioner*, 751 F. 2d at 514; *Meiers v. Commissioner*, 782 F.2d at 79. See *Pormarantz v. Commissioner*, *supra*. Comparing the amount of time petitioner spent working at his respective places of business clearly leads to the conclusion that Suburban Hospital was where petitioner spent most of his business time.

In *Pomarantz* v. *Commissioner*, *supra*, we and the Ninth Circuit denied a home office deduction under circumstances strikingly similar to those in the instant case. Dr. Pomarantz was an emergency room physician. All of his treatment of patients occurred at the hospital where he spent about 33 to 36 hours per week. The hospital did not provide adequate office space. Dr. Pomarantz maintained a home office at which he kept an extensive medical library, business records, and copies of patient charts. He spent time at his home office reading medical publications, conducting patient follow-up activities, and performing business-related duties. In certain weeks, the time spent in home office business activities exceeded time spent at the hospital; but, in most weeks and as an average, he spent more time per week working at the hospital. We described Dr. Pomarantz' home office activities as "clearly essential" to his medical practice. In denying the home office deduction, we held that under either the "focal point" test or the test applied in the Second and Seventh Circuits, the taxpayer's principal place of business was at the hospital.

> In terms of importance the principal place or focal point of petitioner's business was clearly the hospital. Petitioner diagnosed and treated injuries and illnesses and consulted with pa-

tients, at the hospital. As a practicing physician, the hands-on treatment of patients is the essence of petitioner's profession. Following up on patients whom he had treated was unquestionably an important part of his duties as a physician. Continuing education in a rapidly developing and changing area of medicine such as emergency care is also clearly essential. Nevertheless, we do not find that petitioner's activities conducted in his home office were of sufficient importance to make it his principal place of business under section 280A(c)(1)(A).

We have considered the fact that the hospital did not provide petitioner with adequate office space in which to read and study and to perform all patient follow up to the extent necessary. Furthermore, petitioner needed space in which to maintain corporate records. Nevertheless, these facts do not dissuade us from our conclusion that the hospital was the focal point of petitioner's trade or business. Many professions require some work at home, but this does not make the home office the taxpayer's principal place of business. Although his home office was appropriate and helpful, that is simply no longer the standard in light of the desire of Congress to restrict and clarify home office deductions via enactment of section 280A. [*Pomarantz v. Commissioner*, T. C. Memo. 1986-461, 52 T.C.M. 599, 602, 55 P-H Memo T. C. par. 86,461 at 2131.]

In affirming our opinion the Ninth Circuit held:

> Without adopting a specific standard, we believe that under any of these tests, the hospital, rather than the home, was Dr. Pomarantz's principal place of business. He consistently spent more time on duty at the hospital rather than at home. The essence of his profession is the hands-on treatment of patients which he did only at the hospital and never at home. Finally, he generated income only by seeing patients at the hospital not studying or writing at home. His home office was not his principal place of business within 26 U.S.C. § 280A(c)(1)(A). [*Pomarantz v. Commissioner*, 867 F.2d at 497-498.]

The majority attempts to distinguish *Pomarantz* by saying that Dr. Pomarantz "spent an insubstantial amount of time in his home office." (Majority op. p.13.) Neither this Court nor the Ninth Circuit Court of Appeals found that Dr. Pomarantz spent an insubstantial amount of time in his home office. The Ninth Circuit simply observed that Dr. Pomarantz "spent *more* time on duty at the hospital rather than at home. * * *" *Pomarantz v. Commissioner*, 867 F.2d at 497. (Emphasis added.) After describing the various activities Dr. Pomarantz performed in his home office, we found as a fact that "In certain weeks the time required in these additional [home office] activities surpassed the amount of time petitioner spent treating patients at the hospital. In most weeks, however, and as an average, petitioner spent more time per week working shifts at the hospital than working in his home office." *Pomarantz v. Commissioner*, T.C. Memo. 1986-461, 52 T.C.M. at 600-601, 55 P-H Memo T.C. at 2129. This finding does not indicate in any way that Dr. Pomarantz' home office time was insubstantial. *Pomarantz* cannot be distinguished on the basis suggested by the majority, and the majority makes no attempt to draw any other distinctions.

In two recent unpublished opinions, the Sixth Circuit Court of Appeals seems to have adopted the same standards for purposes of section 280A as the

Ninth Circuit. *Kisicki v. Commissioner*, 871 F.2d 1088 (6th Cir. 1989), affg. a Memorandum Opinion of this Court; *Dudley v. Commissioner*, 860 F.2d 1078 (6th Cir. 1988), affg. a Memorandum Opinion of this Court.

The majority holds that the principal place of business for a doctor who performs all medical services at the hospital and spends a lesser amount of time performing his administrative and billing activities in his home, is the place where administrative and billing activities are carried out. This new test appears to be an insupportable and unexplained reincarnation of the "focal point" test that merely shifts the focus from the place where the taxpayer meets and deals with his patients, customers, students, audience, etc., to the place where administrative and billing activities are performed.

It may seem unfair to deny deductions for home office expenses that are essential to a taxpayer's business. Deductions, however, are a matter of legislative grace. Section 280A clearly disallows home office deductions unless there is a specific statutory exception. There is no exception for home office activities that are "essential" or "substantial." In enacting section 280A, Congress sought to provide definitive rules to alleviate administrative burdens inherent in trying to distinguish between business and personal expenses. *Baie v. Commissioner*, 74 T.C. 105, 108-109 (1980). Surely, Congress anticipated that the effect of section 280A would be to deny deductions to some taxpayers despite the business necessity of activities performed at home. We are not free to disregard a specific, albeit sometimes harsh, statutory restriction on home office deductions by superimposing our own concept of what the law should be. *Baie v. Commissioner*, *supra* at 110.

The majority overrules precedent in this Court on the basis of prior reversals and then fails to adopt the only other test found acceptable by the four circuit courts of appeals mentioned. The majority provides no criteria for comparing a taxpayer's several places of business in order to determine which is the "principal place of business."[5] I would apply the test adopted by the Second and Seventh Circuit Courts of Appeals, which has also been used by the Sixth and Ninth Circuits. Under that test, we must determine the place where the dominant portion of the taxpayer's work is accomplished. Under that test, petitioner is not entitled to a home office deduction.

NIMS, CLAPP, and PARR, *JJ.*, agree with this dissent.

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[5] Principal means "Chief; leading; most important or considerable; primary. Highest in rank, authority, character, importance, or degree." Black's Law Dictionary, p. 1073 (5th ed. 1979).

APPENDIX C

UNITED STATES TAX COURT

Docket No. 35698-87

NADER E. SOLIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

DECISION

Pursuant to the opinion of the Court filed January 18, 1990, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from petitioner for 1983 in the amount of $17,395.50.

That there is an addition to tax due from the petitioner for 1983, under the provisions of I.R.C. § 6651(a)(1), in the amount of $869.78.

That there is an addition to tax due from the petitioner for 1983, under the provisions of I.R.C. § 6653(a)(1), in the amount of $869.78.

That there is an addition to tax due from the petitioner for 1983, under the provisions of I.R.C. § 6653(a)(2), in an amount to be determined equal to 50% of the interest due on $14,684.50 of the deficiency.

That there is an addition to tax due from the petitioner for 1983, under the provisions of I.R.C. § 6661, in the amount of $3,671.12.

(Signed) Jules G. Körner III
Judge

Entered: Apr. 23, 1990

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed August 22, 1991

No. 90-1807

NADER E. SOLIMAN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant filed a petition for rehearing with suggestion for rehearing in banc. A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc. Judges Russell, Phillips, and Murnaghan voted to rehear the case in banc, and Chief Judge Ervin and Judges Widener, Hall, Sprouse, Wilkinson, Wilkins, Niemeyer and Hamilton voted against rehearing in banc.

The majority of the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Phillips.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed August 29, 1991

No. 90-1807

SOLIMAN

v.

COMMISSIONER

MANDATE

The judgment of this Court dated 6/5/91 takes effect today.

JOHN M. GREACEN
Clerk

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Supreme Court, U.S.
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OFFICE OF THE CLERK

(2)

No. 91-998

In the Supreme Court of the United States

OCTOBER TERM, 1991

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NADER E. SOLIMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an office maintained by a self-employed person in his residence qualifies as his "principal place of business" under Section 280A of the Internal Revenue Code, 26 U.S.C. 280A—and the expenses related to that area of his home are therefore deductible in computing his taxable income—if he spends a greater part of his working time elsewhere, performing the services from which his income is derived.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-998

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NADER E. SOLIMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 935 F.2d 52. The opinion of the Tax Court (Pet. App. 12a-41a) is reported at 94 T.C. 20.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1991. A petition for rehearing with a suggestion for rehearing *en banc* was denied on August 22, 1991, with three judges dissenting (Pet. App. 44a-45a). On November 6, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 20, 1991. The petition was filed on December 19, 1991, and was

granted on March 23, 1992. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 280A of the Internal Revenue Code, 26 U.S.C. 280A, provides in pertinent part:

> **(a) General rule**
>
> Except as otherwise provided in this section, in the case of a taxpayer who is an individual or an S corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.
>
> * * * * *
>
> **(c) Exception for certain business or rental use; limitation on deductions for such use**
>
> (1) *Certain business use*
>
> Subsection (a) shall not apply to any item to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis—
>
> (A) [as] the principal place of business for any trade or business of the taxpayer.
>
> * * * * *

STATEMENT

1. Respondent is a self-employed anesthesiologist. During 1983, respondent practiced his profession at Suburban Hospital in Bethesda, Maryland, at Shady Grove Hospital in Rockville, Maryland, and at Loudoun Memorial Hospital in Leesburg, Virginia, where he administered anesthesia to patients, cared for patients immediately after surgery, and treated

patients for pain. He spent thirty to thirty-five hours per week engaged in his practice at those hospitals. Approximately 80% of that time (or about 24 to 28 hours each week) was spent at Suburban Hospital. None of the hospitals provided respondent with a personal office (Pet. App. 2a).

Respondent used a spare bedroom in his residential condominium in McLean, Virginia, as an office, where he kept patient records, correspondence, billing records, medical journals and texts. The room was furnished with a desk, chair, couch, telephone, answering machine, copier and file cabinet. Respondent never treated patients in the home office, but he spent two to three hours a day there, where he spoke on the telephone with surgeons, patients, and hospitals, kept records, prepared for treatments and presentations, satisfied continuing medical education requirements and kept abreast of advances in anesthesiology (Pet. App. 2a-3a, 14a; C.A. App. 14-15).

On his federal income tax return for 1983, respondent claimed deductions for condominium fees, utilities, and depreciation attributable to the home office. He also claimed deductions for expenses incurred in driving between his residence and the hospitals, including depreciation on his personal automobile (Pet. App. 14a-15a).[1] The Commissioner of

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[1] Respondent deducted the automobile expenses on the theory that, if his home office is his "principal place of business," his expenses in traveling between that office and the three hospitals where he administered anesthesia to patients constitute ordinary and necessary business expenses under Section 162 of the Code, 26 U.S.C. 162. If his home does not qualify as his principal place of business under Code Section 280A, these travel costs would be non-deductible commuting expenses. See *Fausner* v. *Commissioner*, 413 U.S. 838 (1973) (per curiam).

Internal Revenue disallowed these deductions because respondent's home office was not his "principal place of business" within the meaning of Section 280A of the Internal Revenue Code, 26 U.S.C. 280A (Pet. App. 3a, 14a-15a).

2. Respondent filed a petition in the Tax Court seeking review of the resulting income tax deficiency (Pet. App. 1a).[2] In a reviewed decision, a divided Tax Court concluded that respondent's home office was his "principal place of business" within the meaning of Section 280A. The Tax Court majority noted that it previously had regarded what it termed the "focal point" of a taxpayer's business—the place where goods and services are provided to customers and revenues are generated—as his "principal place of business" (Pet. App. 18a; see, *e.g.*, *Baie* v. *Commissioner*, 74 T.C. 105 (1980)). The court concluded that, under the "focal point" test, respondent's office

[2] Respondent also sought review of additional deficiencies resulting from (i) the Commissioner's disallowance of business expense deductions respondent claimed for family trips to the Virgin Islands and to Orlando, Florida and (ii) the Commissioner's inclusion of approximately $31,000 of income that respondent failed to report on his income tax return. The Tax Court sustained the disallowance of respondent's deduction for the purported business trips, finding the trips to be "predominantly personal family vacations" (Pet. App. 25a). The court also determined that respondent had failed to report $29,857 of his taxable income, part of which had been reported on a different return "and $17,425 of which was completely omitted" from any return (*id.* at 26a). As a result of these determinations, the court found respondent liable for deficiencies in tax and for a 25% addition to tax under former Section 6661 due to his "substantial understatement of income tax" (26 U.S.C. 6661(a) (1988)). See Pet. App. 26a-27a. Respondent did not appeal these rulings. See *id.* at 1a n.1.

at home was *not* his "principal place of business" because the activities respondent performed at home, while "essential to his medical practice" (Pet. App. 18a), were "ancillary to the primary income-generating services [respondent] performed as an anesthesiologist at the hospitals" (*ibid.*).

The Tax Court majority stated (Pet. App. 18a), however, that the validity of the "focal point" test had been questioned by the courts of appeals in three cases that reversed Tax Court decisions holding that the taxpayer's home office was not his "principal place of business." See *Drucker* v. *Commissioner*, 715 F.2d 67 (2d Cir. 1983); *Weissman* v. *Commissioner*, 751 F.2d 512 (2d Cir. 1984); *Meiers* v. *Commissioner*, 782 F.2d 75 (7th Cir. 1986). The court concluded that it would therefore no longer follow the "focal point" test and would instead look to the individual "facts and circumstances" of the taxpayer to determine whether his home office was his principal place of business (Pet. App. 19a). In articulating the meaning of its new test, however, the court stated, as a general rule, that it would regard a taxpayer's office at home as his "principal place of business" within the meaning of Section 280A when the "taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business" (Pet. App. 24a). The court held that respondent's home office satisfied that standard, and thus qualified as his principal place of business, even though respondent spent a greater part of his working time at Suburban Hospital, where he performed his most important work (*id.* at 23a).

Chief Judge Nims dissented, joined by Judges Chabot, Parker, Clapp and Parr. He pointed out that, in

the three court of appeals decisions upholding home-office deductions, the most important factor "was that the taxpayer spent the majority of his or her business time at the 'home office,' rather than at the place where goods or services were provided to customers or clients or where income is produced" (Pet. App. 28a). Chief Judge Nims criticized the analysis of the Tax Court majority because it failed to engage in the required comparison between the home office and other places where the taxpayer carried on his business to determine which is *the* principal place of his business (*id.* at 29a-30a). The Chief Judge asserted that "the majority has substituted" a new phrase—"important place of business"—for the statutory phrase—"the principal place of business" (26 U.S.C. 280A(c)(1)(A))—that Congress enacted (Pet. App. 30a). Moreover, Chief Judge Nims stated that the majority's analysis ignores the very reason that Section 280A was enacted: it "takes us all the way back to square one; i.e., to the situation which existed even before Congress took what it thought would be the remedial action of section 280A" (Pet. App. 29a).

Judge Rüwe dissented in a separate opinion, joined in by Chief Judge Nims and Judges Clapp and Parr. Judge Rüwe pointed out that, when a taxpayer performs his trade or business at more than one location, the Commissioner and the courts must compare the relative importance of the various locations where the taxpayer works in order to determine which is the dominant, or "principal," place of the taxpayer's business (Pet. App. 31a). By contrast, the test adopted by the Tax Court majority "eliminates the need to compare the importance of home office activities with the importance of activities at the other place of business or to compare the amount of time spent at the

home office with the amount of time spent at the other place of business" (*id.* at 32a). In his view, the taxpayer's "principal place of business" is the place where the "dominant portion of his work is accomplished" (*id.* at 37a (quoting *Weissman* v. *Commissioner*, 751 F.2d at 514)). Judge Rüwe concluded that the Tax Court majority erred by failing to make "a specific qualitative determination that the home office activities were at least as important to the taxpayer's business as the activities performed away from the home office" (Pet. App. 36a). Judge Rüwe also observed that the decision in this case conflicts with *Pomarantz* v. *Commissioner*, 867 F.2d 495, 496 (9th Cir. 1988), where the court of appeals held that the "principal place of business" of an emergency room physician was the hospital where the physician spent the majority of his working time and performed the most important tasks of his profession (Pet. App. 37a-39a).

3. A divided court of appeals affirmed. The majority stated (Pet. App. 4a-5a n.2) that the Tax Court's "focal point" approach had been criticized in *Drucker*, *Weissman* and *Meiers*. The court concluded that the new test adopted by the Tax Court in this case "does not eviscerate the requirements of section 280A, but simply replaces the inflexible and potentially unjust 'focal point' test" with a standard that "more accurately reflects the purposes and requirements of section 280A" (Pet. App. 6a (footnote omitted)). The court also stated that the test adopted by the Tax Court in this case is consistent with Proposed Treas. Reg. § 1.280A-2(b)(3), which would allow traveling salesmen to deduct "home office" expenses even though they spent most of their time on the road, provided that they spend a substantial

amount of time doing paperwork at home (Pet. App. 5a-6a). Although the court acknowledged that the proposed regulation was not binding on the Commissioner or on the courts (*id.* at 6a), it concluded that the proposal "does evince a policy to allow 'home office' deductions for taxpayers who maintain 'legitimate' home offices, even if the taxpayer does not spend a majority of his time in the office" (*ibid.*).

Judge Phillips dissented. In his view, the majority's analysis "eliminates any need for comparing a taxpayer's use of several business locations to determine which constituted his 'principal place of business'" (Pet. App. 8a). He observed that "the term 'principal place of business' compels an inquiry directed to that specific question—which is the *one* that is 'principal.' Otherwise Congress could have used language such as 'essential place of business' or 'necessary place of business'" (*ibid.*). Judge Phillips concluded that the approach adopted by the majority "avoids what I think a fair application of § 280A(c)(1)(A) flatly compels: a comparison of the uses of multiple business locations to determine which is *the* principal place of business of a taxpayer" (*id.* at 10a). Judge Phillips noted that all other decisions upholding deductions for home office expenses involved "situations where the taxpayer spent the majority of his time in his home office, or did his most important work there, or both" (*id.* at 8a). Judge Phillips concluded (*ibid.*) that the court should have followed *Pomarantz* v. *Commissioner*, 867 F.2d at 497-498, where an emergency care physician's deduction of "home office" expenses was disallowed because the hospital—not the home—was the physician's *principal* place of business.

SUMMARY OF ARGUMENT

Section 280A(c)(1)(A) of the Internal Revenue Code allows a deduction for the expenses of maintaining a home office only when that office is "the principal place" of the taxpayer's business. The courts below erred in concluding (Pet. App. 5a, 24a) that a home office meets this standard if the office is "essential" to the business, the taxpayer spends a "substantial" amount of time there, and there is no other location available to perform these office functions. The statute does not allow a taxpayer to deduct home office expenses when the home is "the principal *office* of the business;" instead, it allows the deduction only when the home office is "the principal *place* of business" (26 U.S.C. 280A(c)(1)(A) (emphasis added)).

In determining which of several business locations is "the principal place of business," it is necessary to conduct a comparative analysis of the time spent, and the importance of the activities performed, at each of the locations. In terms of both time spent and the importance of the business activities conducted, respondent's principal place of business was at Suburban Hospital, where he spent the largest segment of his working time and performed his important income-producing tasks of providing professional services to his patients.

ARGUMENT

RESPONDENT'S HOME OFFICE WAS NOT HIS "PRINCIPAL PLACE OF BUSINESS"

A. The Cost Of Maintaining A Home Office May Be Deducted If The Office Is The "Principal Place Of Business For Any Trade Or Business Of The Taxpayer"

1. *The Statutory Scheme.* Section 162(a) of the Internal Revenue Code generally allows a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." 26 U.S.C. 162(a). The deductions that may be permitted by Section 162(a), however, are limited by other provisions of the Code. See 26 U.S.C. 161, 261; *Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 17 (1974). For example, an expense that might qualify as a business expense is nonetheless not deductible if it constitutes a "personal, living, or family expense[]" within the meaning of Section 262(a) of the Code. See 26 U.S.C. 261, 262(a). Expenses such as the costs of maintaining a household (26 C.F.R. 1.262-1(b)(3)) and of commuting to work (*Fausner* v. *Commissioner*, 413 U.S. 838 (1973) (per curiam)) are prominent examples of such nondeductible personal expenditures.

Section 280A of the Code is specifically designed to limit the deduction of business expenses attributable to maintaining a personal residence. It states, as a general rule, that "[e]xcept as otherwise provided in this section, * * * no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by a taxpayer * * * as a residence." 26 U.S.C. 280A(a).[3] Limited exceptions to this general rule of nondeductibility are provided in Section 280A(c). For example, when a taxpayer is engaged in the business of selling products at retail, Section 280A(c)(2) permits a deduction for expenses attributable to space "used on a regular basis as a storage unit for the inventory of the taxpayer * * *, but only if the dwelling unit is the sole fixed location of such trade or business." Deductions are also permitted for expenses attributable to certain rental use of a residence (Section 280A(c)(3) and (e)) and for use of the home in providing day care services (Section 280A(c)(4)). And, Section 280A(c)(1)—the provision at issue in this case—allows a deduction for expenses "allocable to a portion of the dwelling unit which is exclusively used on a regular basis" (i) as "the principal place of business for any trade or business of the taxpayer," (ii) "as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business," or (iii) in the case of "a separate structure * * * not attached to the dwelling unit, in connection with the taxpayer's trade or business." 26 U.S.C. 280A(c)(1)(A)-(C).[4]

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[3] Section 280A(b) excepts from this prohibition deductions for expenses (such as qualified mortgage interest (Section 163), property taxes (Section 164) and casualty losses (Section 165(c)(3)) that would be deductible under the Code without regard to their connection to the taxpayer's trade or business or to any income-producing activity.

[4] For employees who claim "home office" deductions, Section 280A(c)(1) further limits the deduction to situations where the business use is "for the convenience of his employer." 26 U.S.C. 280A(c)(1). For both employees and the self-employed, the amount deductible under Section 280A is lim-

2. *The Origin of Section 280A.* Section 280A was enacted as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, § 601, 90 Stat. 1520. The statute was Congress's response to the "great need for definitive rules * * * as to the correct standard governing the deductibility of expenses attributable to the maintenance of an office in the taxpayer's personal residence" (H.R. Rep. No. 658, 94th Cong., 1st Sess. 160 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 147 (1976)).

Prior to enactment of the statute, the deduction of "home office" expenses had been permitted under Section 162 whenever the expenses were determined to be "appropriate and helpful" to the taxpayer's business. See, *e.g.*, *Newi* v. *Commissioner*, 432 F.2d 998 (2d Cir. 1970); *Bodzin* v. *Commissioner*, 60 T.C. 820 (1973), rev'd, 509 F.2d 679 (4th Cir.), cert. denied, 423 U.S. 825 (1975); *Hall* v. *United States*, 387 F. Supp. 612 (D.N.H. 1975); *Gill* v. *Commissioner*, 34 T.C.M. (CCH) 10 (1975). Congress was concerned that "[i]n many cases the application of the appropriate and helpful test would appear to result in treating personal, living, and family expenses which are directly attributable to the home (and therefore not deductible) as ordinary and necessary business expenses, even though those expenses did not result in additional or incremental costs incurred as a result of the business use of the home" (H.R. Rep. No. 658, *supra*, at 160; S. Rep. No. 938, *supra*, at 147). Congress disapproved of the results obtained under the "appropriate and helpful" standard be-

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ited to the excess of the gross income derived from the business use of the residence over the deductions that would be allowable without regard to such business use. 26 U.S.C. 280A(c)(5).

cause "expenses otherwise considered nondeductible personal, living, and family expenses might be converted into deductible business expenses simply because, under the facts of the particular case, it was appropriate and helpful to perform some portion of the taxpayer's business in his personal residence" (H.R. Rep. No. 658, *supra*, at 160; S. Rep. No. 938, *supra*, at 147).

Congress recognized that it was extremely difficult to draw distinctions between business and personal uses of a residence under the "appropriate and helpful" standard and was reluctant to require that such distinctions be drawn on a case-by-case basis.[5] In enacting Section 280A, Congress intended to eliminate the "subjective determination" inherent in the "appropriate and helpful" standard in favor of the "definitive rules" prescribed in Section 280A. H.R. Rep. No. 658, *supra* at 160; S. Rep. No. 938, *supra*, at 147.

One of the "definitive rules" that Congress adopted is Section 280A(c)(1)(A), which precludes the deduction of "home office" expenses when the home office is not "the principal place of business for any trade or

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[5] The "appropriate and helpful" standard "increases the inherent administrative problems because both business and personal uses of the residence are involved and substantiation of the time used for each of these activities is clearly a subjective determination" (H.R. Rep. No. 658, *supra*, at 160). The more stringent, objective standards for deductibility contained in Section 280A were intended not only to relieve the IRS of the administrative burdens required to implement the "appropriate and helpful" standard, but also to preclude deduction of inherently personal expenditures in situations where the taxpayer's business use of the home resulted only in "minor incidental expenses" (H.R. Rep. No. 658, *supra*, at 160).

business of the taxpayer." 26 U.S.C. 280A(c)(1)(A). Although the Senate proposed an amendment to this provision that would have allowed a deduction for "home office" expenses whenever "the employer provides no office or fixed location for the use of the employee" (S. Rep. No. 938, *supra*, at 148), that proposal was rejected in conference (S. Rep. No. 1236, 94th Cong., 2d Sess. 435 (1976)).

B. A Taxpayer Who Spends a Greater Part Of His Working Time Performing The Income-Earning Activities Of His Employment At Another Location Cannot Claim His Home Office As His "Principal Place of Business"

Recognizing that Section 280A was enacted to overrule decisions that had liberally permitted the deduction of expenses attributable to the maintenance of offices in personal residences, courts have concluded that Section 280A "imposes a heavy burden upon taxpayers to establish that their 'home office' expenses meet its stringent standards for deductibility" (*Meiers* v. *Commissioner*, 782 F.2d at 77; see *Pomarantz* v. *Commissioner*, 867 F.2d at 496). The standard that the taxpayer failed to meet in this case is the requirement that his home office be "the principal place of business" for his trade or profession (26 U.S.C. 280A(c)(1)(A)).

We do not dispute that respondent's home office was "exclusively used on a regular basis" in performing certain administrative tasks that were necessary and appropriate to his practice of anesthesiology (Pet. App. 17a). That, however, does not suffice to establish that the spare bedroom in his condominium, which was used as a home office, was "the principal

place of business" for his medical practice, as the statute requires. See 26 U.S.C. 280A(c)(1)(A).[6]

1. The determination of the taxpayer's "principal place of business" necessarily requires a comparison of the relative importance of the taxpayer's various places of business

The "starting point in every case involving construction of a statute is the language itself." *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The meaning of the phrase "the principal place of business" is not elaborated in the statute or its legislative history. It is well established, however, that "'the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses'" (*Malat* v. *Riddell*, 383 U.S. 569, 571 (1966) (quoting *Crane* v. *Commissioner*, 331 U.S. 1, 6 (1947))). See also *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 687 (1962); *Commissioner* v. *Korell*, 339 U.S. 619, 627-628 (1950); *Old Colony R.R.* v. *Commissioner*, 284 U.S. 552, 560 (1932). The ordinary meaning of the word "principal" is the "first or highest in rank, importance, value * * * chief, foremost." *Random House Dictionary of the English Language* 1539 (2d

[6] Respondent never met with or treated patients at his home office. The office was thus not "a place of business * * * used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business" within the meaning of Section 280A(c)(1)(B). See *Green* v. *Commissioner*, 707 F.2d 404, 406 (9th Cir. 1983); *Cousino* v. *Commissioner*, 679 F.2d 604 (6th Cir.), cert. denied, 459 U.S. 1038 (1982). The home office also was not loctaed in "a separate structure which is not attached to the dwelling unit" and therefore could not qualify for a deduction under Section 280A(c)(1)(C).

ed. 1987).[7] The word is similarly defined in *Black's Law Dictionary* 1355 (4th ed. 1968) to mean:

> Chief; leading; most important or considerable; primary; original. Highest in rank, authority, character, importance or degree.

When a taxpayer conducts business at more than one location, the determination of which is "*the* principal place of business" thus necessarily requires a comparison of the functions performed, and the time spent, by the taxpayer at the various locations to determine which is the "chief," "most important" or "dominant" location of the business (*Weissman* v. *Commissioner*, 751 F.2d at 514).[8] Until it issued its decision in this case, the Tax Court sought to locate the taxpayer's "principal place of business" by determining the "focal point" of the activities of the business. That test emphasized the location where goods and services are provided and where income is generated in the conduct of the business. See *Baie* v. *Commissioner*, 74 T.C. at 109-110.[9] The Second

[7] See also *Malat* v. *Riddell*, 383 U.S. at 572 (the term "primarily" as used in Section 1221(1) of the Internal Revenue Code "means 'of first importance' or 'principally' ").

[8] Under the analogous language of 28 U.S.C. 1332(c)(1), which treats a corporation for diversity jurisdiction purposes as a citizen of "the State where it has its principal place of business" (*ibid.*), there can be "only *one* principal place of business," even when the business is a "far flung" enterprise (1 *Moore's Federal Practice* ¶ 0.77[1.-2], at 800.82 (2d ed. 1992)). See also notes 12, 13, *infra*.

[9] The Tax Court's "focal point" approach is illustrated by its decision in *Baie* v. *Commissioner*, 74 T.C. at 108-110. The taxpayer in *Baie* operated a hot dog stand. Due to limited space at the stand, she prepared food for the stand in her kitchen. She also used a spare bedroom in her house to keep books and records for the stand. The Tax Court concluded that the hot dog stand was the "focal point" of her activities, and therefore her "principal place of business," because the stand was the place where she provided goods and services to customers and generated income. *Id.* at 109. Although the kitchen was plainly *a* place used for her business, that did not suffice to establish that her kitchen was "the principal place of [her] business," as the statute requires. As the court stated in that case, "[w]e are not * * * at liberty to 'bend' the law, much as we may sympathize with [the taxpayer's] position." *Id.* at 110.

and Seventh Circuits have acknowledged that these factors are significant, but have also required that consideration be given to the *time* spent by the taxpayer at each location and the significance of the functions performed at each. See *Meiers* v. *Commissioner*, 782 F.2d at 79; *Weissman* v. *Commissioner*, 751 F.2d at 514; *Drucker* v. *Commissioner*, 715 F.2d at 69.

For example, in *Drucker* v. *Commissioner*, the Second Circuit concluded that home practice rooms maintained by members of the Metropolitan Opera orchestra were the musicians' principal places of business. The court rejected the Tax Court's conclusion that the principal place of the musicians' business was Lincoln Center, where they performed, because "[b]oth in time and in importance, home practice was the 'focal point' of the appellant musicians' employment-related activities." 715 F.2d at 69. In *Weissman* v. *Commissioner*, the Second Circuit concluded that "the principal place of business" of a college professor was his home office, where he spent "a majority of his working time." 751 F.2d at 516. The court rejected the Tax Court's conclusion that the taxpayer's profession was centered in the classroom.

Ibid.[10] In *Meiers* v. *Commissioner*, the Seventh Circuit disagreed with the Tax Court's finding that "the principal place of business" of a laundromat manager was the laundromat. In the court's view, the home office where the manager worked was, "in terms both of hours worked and probably of functions performed," the taxpayer's "principal place of business." 782 F.2d at 79.[11] Finally, in *Pomarantz* v. *Commissioner*, the Ninth Circuit held, "[w]ithout adopting a specific standard," that the "principal place of business" of an emergency room physician was the hospital where he worked, and not his office at home. 867 F.2d at 497. The court looked to the place where the taxpayer "consistently spen[ds] more time on duty," where he exercises the skills constituting "[t]he essence of his profession," and where he "generate[s] income" (867 F.2d at 497-498).

The common logical thread that connects these decisions is that a taxpayer's "principal place of business" must be determined by a comparison of the significance of, and the time devoted to, the activities conducted at each place of business. This comparison must be made so that the *one* principal place of business can be determined. It is this principle, which the statute directly invokes, that the Tax Court and the court of appeals failed to follow in the present case.

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[10] The court also found that the "convenience of the employer" requirement was met because "the employer provided [the taxpayer] no *suitable* space for engaging in necessary employment-related activities." 751 F.2d at 516-517.

[11] The court stated in *Meiers* that, "[i]n determining the taxpayer's principal place of business, we think a major consideration ought to be the length of time the taxpayer spends in the home office as opposed to other locations." 782 F.2d at 79.

Although the Tax Court stated in this case that it would consider the "facts and circumstances" of each case to determine whether the home office was the taxpayer's principal place of business (Pet. App. 19a), it then announced, as a general rule, that a home office may qualify as "the principal place of business" within the meaning of Section 280A when the (Pet. App. 24a)

> taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business.[12]

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[12] The Tax Court described the taxpayer's home office in this situation as the "headquarter[s]" of the business (Pet. App. 23a). Although neither the Tax Court nor the court of appeals (in accepting this rationale) remarked upon the fact, this "headquarters" analysis is similar to the "nerve center" analysis that courts have sometimes employed under 28 U.S.C. 1332(c)(1) to conclude, for diversity jurisdiction purposes, that a corporation's "principal place of business" is at "the company's headquarters or home office" (1 *Moore's Federal Practice*, *supra*, at 800.106; see *Scot Typewriter Co.* v. *Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959)). The "nerve center" test, however, has proper application only when a corporation has "far-flung and possibly varied activities carried on substantially in several states. With activities so dispersed, there is no single state in which activities dominate so as to justify the label 'principal.' * * * [T]here is a clear majority view that the [nerve center] test ought to be limited to such situations." 1 *Moore's Federal Practice*, *supra*, at 800.108.

The more generally applicable test under 28 U.S.C. 1332(c)(1) is the "place of operations" test which—like the "focal point" test formerly applied by the Tax Court under Section 280A—looks "not [to] the nerve center, but [to] the place where the corporate activities or operations are carried out." 1 *Moore's Federal Practice*, *supra*, at 800.111; see *Inland Rubber Corp.* v. *Triple A Tire Service, Inc.*, 220 F. Supp. 490,

The court of appeals accepted this rationale and incorporated it as the basis for its decision (*id.* at 5a).

The language and history of Section 280A do not permit these conclusions to stand. (i) Since almost *any* business may require an office of some type, if the mere fact that an office is "essential" to the business made the office "the principal place of business," the statute would be largely meaningless. (ii) The fact that a "substantial" amount of time is spent in the office also cannot be sufficient in determining "the principal place of business" when, as in this case, a *greater* amount of time is spent conducting the more important, income-earning activities of the business at another location.[13] Such a view deprives the statu-

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492-494 (S.D.N.Y. 1963). When the headquarters of a corporation is in one State, but its "physical operation [is] wholly or predominantly in another state, most courts have agreed with *Inland Rubber* that the latter state is the situs of the corporation's principal place of business." 1 *Moore's Federal Practice*, *supra*, at 800.112 & n.9 (citing cases).

Under 28 U.S.C. 1332(c)(1), "[a]s a general rule, the determination of a corporation's principal place of business ought to emphasize the business *activities* or *operations* rather than policy-making or executive decisionmaking." 1 *Moore's Federal Practice*, *supra*, at 800.116. This conclusion under the diversity jurisdiction statute is even more appropriate under Section 280A, since Congress designed the latter statute specifically to curtail a preexisting abuse by requiring that the *office* be the principal place of the *business* for the costs of the home office to be deductible. If Congress meant to accomplish what the courts construed Section 280A to mean in this case, the statute would allow deduction for the costs of the "principal office of the business" rather than for an office that is "the principal place of business" (26 U.S.C. 280A (c)(1)(A)).

[13] The court of appeals erred in this regard in relying (Pet. App. 5a-6a) on Section 1.280A-2(b)(3) of the Proposed In-

tory word "principal" of its ordinary meaning. See pages 15-16, *supra*. (iii) The fact that no other office is "available to perform the office functions" of the business (Pet. App. 24a; see *id.* at 5a) is simply irrelevant under the statute. A home office *could* be

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come Tax Regulations (26 C.F.R.), 45 Fed. Reg. 52,399 (1980), as amended, 48 Fed. Reg. 33,320 (1983), which would, in some circumstances, allow traveling salesmen to deduct "home office" expenses if they spend substantial amounts of time doing paperwork at home. As the court of appeals itself noted (Pet. App. 6a), it is well settled that proposed regulations are not binding on the courts or on the Commissioner. See, *e.g.*, *Estate of Leavitt* v. *Commissioner*, 90 T.C. 206, 218 (1988), aff'd, 875 F.2d 420 (4th Cir.), cert. denied, 493 U.S. 958 (1989); *Garvey, Inc.* v. *United States*, 1 Cl. Ct. 108, 118 (1983), aff'd, 726 F.2d 1569 (Fed. Cir. 1984).

In any event, the proposed regulation does not support the Fourth Circuit's decision. As pointed out by dissenting Judge Phillips, traveling salesmen "spend more time on the road than in their home offices, [but] they may spend more time at their home offices than in any one particular place that they sell goods" (Pet. App. 10a-11a n.5). In this respect, the proposed traveling salesmen regulations appear to represent an example of the "nerve center" approach to determining the principal location of a business (see note 12, *supra*). But that approach (and the proposed regulations) are not applicable in situations such as the present case where respondent, in addition to spending the majority of his time at the three hospitals, spent far more time at Suburban Hospital alone than he did at his home office. As Judge Phillips stated, his office "is not the base for his business in the same way that it would be for a salesperson" (Pet. App. 10a-11a n.5). Neither the proposed regulation nor the "nerve center" theory (see note 12, *supra*) can support the conclusion of the court below that the home office of a self-employed individual may constitute his "principal place of business" even though he spends the majority of his time and performs his income-earning functions at another location.

"the principal place of business" even when another office is also used in the business, if that other office is not the principal location of the business.[14] Moreover, Congress considered and expressly rejected a proposal that would have allowed a home office deduction under Section 280A in circumstances where "the employer provides no office or fixed location for the use of the employee" (S. Rep. No. 938, *supra*, at 148). See page 14, *supra*. Since Congress rejected that view, it should not be judicially engrafted onto the statute. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

The test applied by the court of appeals in this case construes the statutory language, "the principal place of business," as if it read "the principal office of the business." That judicial gloss has no basis in the text or history of the statute. As Chief Judge Nims noted in dissent in the Tax Court, the decision in this case interprets the statute to reach precisely the result that Congress set out to correct in enacting Section 280A, for it returns to the rejected view that the costs of maintaining a home office that is appropriate and helpful to the business may be deducted (Pet. App. 29a). The test applied by the lower courts ignores the comparative inquiry that the statute requires as to the relative importance to the business of the various activities performed at each of several business locations, to determine *which* location is "the principal" place of business.

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[14] For example, in *Weissman* v. *Commissioner*, 751 F.2d at 516, the court held that the home office of a college professor was his principal place of business even though his employer provided him with a shared, on-campus office space and library facilities.

2. *Suburban Hospital Was The Principal Place Of The Taxpayer's Business In This Case*

Conducting the comparative inquiry that Section 280A requires, it becomes apparent that, in terms of both the time spent and the importance of the activities performed, respondent's principal place of business was Suburban Hospital, not the spare room at his home that he used as an office. Respondent spent the majority of his working time (approximately 30 to 35 hours per week) at the three hospitals where he administered anesthesia to patients during surgery and ministered to them after surgery. He spent the greatest single segment of time (from 24 to 28 hours per week) devoted to the practice of his profession at Suburban Hospital. He spent far less of his time (from 2 to 3 hours a day) in an office at his home performing administrative tasks related to his medical practice.

By any standard, Suburban Hospital was respondent's "principal place of business." The operating room and the recovery room were the locations where respondent practiced medicine, generated fees, and spent the greatest single segment of his working time. The essence of respondent's profession is the preparation for surgery, the administration of anesthesia to patients during surgery, and the care of patients immediately after surgery. These are tasks that cannot be performed (and that respondent did not perform) anywhere but at a hospital. It is true that respondent also spent a lesser number of hours each week in his home office performing various tasks that were related to, and required for, his practice of medicine. The critical fact remains, however, that respondent spent the majority of his time, and performed his most important income-earning activities, minister-

ing to patients at hospitals, and principally at Suburban Hospital.[15] As the Tax Court observed in *Baie* v. *Commissioner*, even though the taxpayer's home may be *a* place of business, it must be "the principal" place of his business for the deduction to be available; the courts have no "liberty to 'bend' the law" or to ignore its plain requirements. 74 T.C. at 110.

What the statute requires in determining whether a home office is "the principal place of business" is a comparative analysis of the places where the taxpayer carries on his trade or business. The deduction for "home office" expenses is permitted under the statute only when that office is the *most* important location at which the taxpayer performs his trade or business. See *Cadwallader* v. *Commissioner*, 919 F.2d 1273, 1275 (7th Cir. 1990) ("the taxpayer must show that [the home office] is his *principal* place of business, not just a cozy den in which he grades exam papers in the evening"). As Judge Phillips correctly noted in his dissent (Pet. App. 8a), "the term 'principal place of business' compels an inquiry directed to that specific question—which is the *one* that is 'principal.' Otherwise Congress could have used language such as 'essential place of business' or 'necessary place of business.'"[16] An exclusive focus on

[15] The Tax Court majority acknowledged (Pet. App. 18a) that, under the "focal point" approach that the court previously had used in determining a taxpayer's "principal place of business," Suburban Hospital was respondent's "principal place of business." See *Pomarantz* v. *Commissioner*, *supra*; *Anderson* v. *Commissioner*, 44 T.C.M. (CCH) 1305, 1308 (1982) ("the principal place of business" of nurse anesthetist was the hospitals where he administered anesthesia to patients, rather than a home office used to bill patients).

[16] The test adopted by the courts below does no more than restate Section 162(a), which allows a deduction only for

the nature of the administrative activities performed in respondent's office at home—without an assessment of the time spent at the several locations of respondent's business or of the relative importance of these activities—ignores the statutory requirement that the various places of business be compared to determine which is "the principal" one.

The approach taken by the courts below is manifestly at odds with the comparative analysis required by the Second and Seventh Circuits (in *Weissman*, *Drucker*, and *Meiers*) and by the terms of Section 280A.[17] By contrast, on facts that are not distin-

expenses that constitute ordinary and necessary expenses of the taxpayer's trade or business. See, *e.g.*, *Welch* v. *Helvering*, 290 U.S. 111, 113 (1933); *Commissioner* v. *Tellier*, 383 U.S. 687, 689 (1966). In enacting Section 280A, however, Congress specifically imposed more stringent requirements, in addition to the fundamental requirements of Section 162(a), on the deduction of expenses incurred by a taxpayer in maintaining an office in his home. See H.R. Rep. No. 658, *supra*, at 160; S. Rep. No. 938, *supra*, at 147.

[17] In many, and perhaps most, cases, a taxpayer will spend the greater part of his time where he performs his most significant work, as is true in this case. As a general rule, the location of an individual's business activities or operations, rather than of his administrative functions, would normally best define "the principal place" of his business. See 1 *Moore's Federal Practice*, *supra*, at 800.116.

We doubt, however, that any universal formula can be devised that will unfailingly designate "the principal place of business" in every case. See 1 *Moore's Federal Practice*, *supra*, at 800.117. Thus, we do not question that the amount of time spent working at various locations, in addition to the type of work performed at those locations, is entitled to some consideration in determining the "principal place" of a taxpayer's business. The significance of time, however, is not necessarily determinative, and for that reason we question the conclusion reached in cases such as *Drucker*, where the court held that a home practice area is "the principal place

guishable from those of the present case, the Ninth Circuit held in *Pomarantz* v. *Commissioner*, 867 F.2d at 497, that the home office of an emergency care physician was not his "principal" place of business.[18] In *Pomarantz*, the physician treated patients at a hospital, where he spent 33 to 36 hours per week. The hospital did not provide the taxpayer with a private office. The taxpayer maintained a home office where—like respondent—he kept his medical library, business records, and patient charts. He spent 150 to 250 hours per year in his home office reading pub-

of business" of a musician. If a taxpayer's business consists of performing in an orchestra, we do not doubt that any ordinary and necessary expenses that he incurs for practice and other preparation for performance would ordinarily constitute deductible business expenses. But that does not mean that a home practice room is "the principal place of business" for a concert musician even if, as is the case in many realms of activity, more time is spent in preparation than in assembled rehearsal or performance.

For the performer or entrepreneur, as well as for the scholar, it seems important to keep in mind that by permitting the deduction only for certain "business" uses of the home, Congress required that the deduction relate to activities designed to earn a profit. See, *e.g.*, *Brook, Inc.* v. *Commissioner*, 799 F.2d 833, 839-840 (2d Cir. 1986); *Zell* v. *Commissioner*, 763 F.2d 1139, 1142 (10th Cir. 1985); *Gajewski* v. *Commissioner*, 723 F.2d 1062, 1065 (2d Cir. 1983), cert. denied, 469 U.S. 818 (1984). Since a "business" under the Code must be an activity designed to produce income, the principal place of a "business" should ordinarily refer to the principal place where income is earned. The "focal point" test previously applied by the Tax Court properly encapsulates that principle.

[18] The court of appeals majority did not even cite *Pomarantz*, much less attempt to distinguish that case, even though Judge Phillips pointed out in dissent (Pet. App. 10a) that the analysis of *Pomarantz* should be controlling in this case.

lications and used the office for other medically-related tasks, such as reviewing laboratory test results and X-rays. The Tax Court in *Pomarantz* concluded that the hospital, rather than the taxpayer's home office, was his "principal place of business." The Ninth Circuit affirmed, noting that the taxpayer "consistently spent more time on duty at the hospital than at home" and "[t]he essence of his profession [was] the hands-on treatment of patients," which he did only at the hospital. *Ibid.*

The same analysis, and the same conclusion, apply to this case.[19] The same factors that required the conclusion that the doctor in *Pomarantz* did not have his principal place of business at home are also present here: in terms of both the time spent and the importance to the business of the activities conducted, respondent's business is centered at the hospitals where he practices medicine, not in his home office.

3. *The decision of the court of appeals expands the availability of the "home office" deduction beyond that intended by Congress*

The analysis applied by the court of appeals in this case would vastly expand the class of taxpayers

[19] The Tax Court majority in the present case attempted to distinguish its prior decision in *Pomarantz* on the ground that the taxpayer in that case "spent an insubstantial amount of time in his home office" (Pet. App. 22a). As Judge Rüwe noted in his dissent, however, neither the Tax Court nor the court of appeals "found that Dr. Pomarantz spent an insubstantial amount of time in his home office. The Ninth Circuit simply observed that Dr. Pomarantz 'spent *more* time on duty at the hospital rather than at home'" (Pet. App. 39a). The significant conclusion that was the basis for the decision in *Pomarantz* was that the taxpayer spent *more* time working at the hospital, where he performed his most important functions, than he did at home.

eligible to claim a deduction for "home office" expenses. Many thousands of individuals perform "substantial" work at home that is "essential" to their business, but spend most of their time and perform their most important work elsewhere.[20] All that appears necessary, under the decisions below, for an individual to deduct "home office" expenses, is that he have no other location available where he can perform the necessary administrative functions of his business.

But Congress made a deliberate decision in enacting Section 280A to preclude deduction of "home office" expenses that otherwise would qualify as "ordinary and necessary" business expenses deductible under Section 162(a). Under the more stringent standards of Section 280A, the home office must con-

[20] For example, under the standard adopted by the courts in this case, a teacher who lacks effective after-hours access to school facilities could contend that he is entitled to deduct the expenses of maintaining an area at home that is exclusively used on a regular basis for grading papers, or planning lessons, or speaking on the telephone with parents and students, even though in terms of both time and importance the teaching profession is centered in the classroom and even though only minor incremental costs are incurred in maintaining an office at home. In *Denison* v. *Commissioner*, 30 T.C.M. (CCH) 1074 (1971), which was decided before Section 280A was enacted, teachers were permitted a home office deduction when they performed substantial non-classroom duties at home in connection with their employment. See also *Bodzin* v. *Commissioner*, 509 F.2d 679, 681 (4th Cir.), cert. denied, 423 U.S. 825 (1975); *Hall* v. *United States*, 387 F. Supp. at 613. These decisions were examples of the abuse of the home office deduction that Congress sought to overrule in enacting Section 280A. See H.R. Rep. No. 658, *supra*, at 160; S. Rep. No. 938, *supra*, at 147; Staff of Joint Committee on Taxation, 94th Cong., 1st Sess., *General Explanation of the Tax Reform Act of 1976*, at 151 (Jt. Comm. Print 1976).

stitute the taxpayer's "principal place of business" for these expenses to be deductible. The decision in this case defeats the central purpose of the statute by permitting the deduction of "home office" expenses when the home office is "essential" to the taxpayer's trade or business, even if it is not the "principal" location of the business.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 91-998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER

v.

NADER E. SOLIMAN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether an office maintained by a self-employed person in his residence qualifies as his "principal place of business" under Section 280A of the Internal Revenue Code, 26 U.S.C. 280A -and the expenses related to that area of his home are therefore deductible in computing his taxable income - if the taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business.

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COMMISSIONER OF INTERNAL REVENUE,

PETITIONER

No. 91-998

NADER E. SOLIMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

STATEMENT

With the exception of one statement, the facts of this case as set forth by the Commissioner in his Brief are adequately stated. However, the Commissioner's

Statement indicates that the Tax Court held the Respondent's home office to be his principal place of business even though he "performed his most important work [at Suburban Hospital]" (Commissioner's Brief 5). The Tax Court never made such a finding. The Tax Court expressly found that the activities conducted by Respondent at the hospitals and in his home office "were equally essential to a successful medical practice" (Emphasis added) (Pet. App. 20a).

SUMMARY OF ARGUMENT

Section 280A (c)(1)(A) of the Internal Revenue Code allows taxpayers a home office deduction when that office is their principal place of business. The Tax Court, as affirmed by the Court of Appeals,

has determined that Respondent's home office was his principal place of business based upon an analysis of all of the applicable facts and circumstances of the case. In making this determination, the Tax Court rejected the "focal point" test and established a new test for determining the location of a taxpayer's principal place of business. This new test is entirely consistent with the legislative history of Section 280A which clearly indicates that Congress enacted the statute to prevent typical employees from taking unjustified home office deductions. Those taxpayers at whom Section 280A was directed will continue to be denied home office deductions under the new "Soliman" test. However, independent contractors, such as Respondent, who would have been unjustly denied a home office deduction under the

"focal point" test, will now be permitted that deduction under the "Soliman" test.

ARGUMENT

RESPONDENT'S HOME OFFICE WAS HIS "PRINCIPAL PLACE OF BUSINESS"

A. The Activities Undertaken By Respondent In His Home Office And the Amount Of Time Spent In That Office Support the Decisions Of The Courts Below That Respondent's Home Office Was His Principal Place Of Business

In 1983, Respondent Nader E. Soliman ("SOLIMAN") was an anesthesiologist in private practice performing services at three hospitals, Suburban Hospital in Bethesda Maryland, Shady Grove Memorial Hospital in Rockville, Maryland and Loudon

Memorial Hospital in Leesburg, Virginia. He worked as an independent contractor and was not an employee of these hospitals. SOLIMAN, like most anesthesiologists, meets with and treats his patients only in a hospital. However, there is more to being an anesthesiologist than merely appearing in an operating room to put a patient to sleep. SOLIMAN conducts the business of being an anesthesiologist, so although his profession is anesthesiology, he is also a businessman. His business is providing anesthesia services to patients in hospitals. Like most businessmen, all that the public sees or is aware of is the brief point of direct contact and the actual performance of the skills -- in this case supplying anesthesia. Obviously, there is more involved.

Since SOLIMAN is a businessman, he must

perform all the day to day activities required to run a business. In order to remain in business a businessman must maintain his client base and secure new clients; records must be kept detailing services provided; bills must be made out, accounts collected and bank statements reconciled; he must keep current with trends and advancements in his profession as well as meet the requirements necessary to maintain his license to do business.

SOLIMAN was not provided with an office at any of the hospitals where he worked. As a result, one room of his three room apartment was used as an office. It contained standard office equipment and the only personal use made of the office was to balance his checkbook which combined his business and personal financial affairs.

The trial transcript contains 15 pages

of testimony by SOLIMAN describing the activities he must undertake in order to run his business (C.A. App. 10-24). In his home office, SOLIMAN kept records of all his previous patients in case they required information at a later time. He kept a daily log of patients treated, services performed, payments made and outstanding account balances. Detailed billing records were compiled and modifications and adjustments made based on the patient's age, physical condition and the emergency status of the surgery. This information was recorded in a patient log, copied and sent to a billing service. In this office, SOLIMAN corresponded with patients, surgeons and insurance companies. SOLIMAN was also contacted at this office by surgeons specifically requesting his services. In addition to his anesthesia

practice, SOLIMAN administered pain treatments to his own patients. These patients contacted him in this office. He then contacted the hospital to arrange for their admission. Also in this office were medical books, journals and video tapes. These were used not only to stay current with advancements in his profession but for reference in difficult cases.

In order to maintain his license to practice, SOLIMAN was required to complete 100 hours of continuing medical education every two years. SOLIMAN fulfilled this requirement through home study, spending two to three hours in his office to obtain each one hour of credit. In addition, one of the hospitals where SOLIMAN worked required him to give a monthly one hour lecture. SOLIMAN spent approximately two to three hours, in his office, preparing

for each lecture. Over all, SOLIMAN "spent an average of 2 to 3 hours a day working in his home office" (Pet. App. 14a).

Clearly, the importance of the above described activities cannot be overstated. They were indispensable. If SOLIMAN did not undertake the activities summarized above and detailed in 15 pages of testimony, he would be an anesthesiologist without any patients, without any income, and in two years' time, without a license to practice. Those activities had to be done. They were <u>essential</u> if SOLIMAN was to continue in the business of being an anesthesiologist. Based on the above factors, the Tax Court determined that SOLIMAN's "home office was his principal place of business" and he was therefore entitled to deduct his home office expenses pursuant to Internal Revenue Code Section

280A (Pet. App. 24a-25a).

B. Section 280A Permits The Deduction Of Home Office Expenses When a Taxpayer's Home Office Is His Principal Place Of Business

Section 280A initially provides that expenses attributable to maintaining a home office are not deductible. Thereafter, it sets forth exceptions to this rule in certain limited and specified circumstances. Among these circumstances are when the office is used exclusively and regularly (i) "as the principal place of business for any trade or business of the taxpayer"; or (ii) "as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business." In the case of an employee, these exceptions apply only if the office

is maintained for the convenience of his employer. The only circumstance applicable to SOLIMAN is Section 280A (c)(1)(A), the principal place of business exception.

In Baie v. the Commissioner, 74 T.C. 105 (1980), the Tax Court noted that "[n]othing in the legislative history of Section 280A or the Commissioner's regulations furnishes any guidance as to the scope of the 'principal place of business' concept in the context of section 280A. We therefore take it that what Congress had in mind was the focal point of a taxpayer's activities." 74 T.C. at 109. However, the Tax Court was never able to provide any basis for this conclusion as to Congressional intent.

The "focal point" test emphasizes "the place where goods and services are provided to customers and revenues are generated"

(Pet. App. 18a). As stated by the Tax Court, [u]nder this test, [SOLIMAN's] home office is not the 'focal point' of his business" (Pet. App. 18a). The Tax Court noted, however, that the Second and Seventh Circuit Courts of Appeals have questioned the "focal point" test. See Meiers v. Commissioner, 782 F.2d 75 (7th Cir. 1986), Weissman v. Commissioner, 751 F.2d 512 (2d Cir. 1984) and Drucker v. Commissioner, 715 F.2d 67 (2d Cir. 1982). "In light of this response, [the Tax Court proceeded] to revisit the 'focal point' test and [their] interpretation of Section 280A" (Pet App. 18a). Since there is no basis in the legislative history for the "focal point" test, the Tax Court reviewed the language of the statute and correctly concluded that

> Goods and services could be transferred to customers and clients in the taxpayer's home, the 'focal point,' only if the taxpayer meets

> clients or customers in his home. The 'focal point' test, therefore, merges the 'principal place of business' exception with the 'meeting of clients' exception and practically eliminates the principal place of business exception from section 280A. ... If the 'principal place of business' exception has meaning independent of the exception for home offices used to meet clients or patients, then the 'focal point' test should give way to an analysis of all the facts and circumstances. The determination of 'principal place of business' necessarily depends on the facts and circumstances of each case (Pet. App. 19a).

An analysis of the "facts and circumstances" caused the Tax Court to conclude that the activities undertaken by SOLIMAN in his home office were "essential" (Pet. App. 22a). The Court further found that "[h]e spent approximately 30 percent of his time in his home office ... [and] had no place to manage his medical practice other than in his home" (Pet. App. 23a). The Court then held "that [SOLIMAN's] home

office was his principal place of business, and we will no longer follow our opinion in Drucker v. the Commissioner, supra, [the 'focal point test'] in cases in which a taxpayer's home office is essential to his business, he spends substantial time there, and there is no other location available to perform the office functions of the business" (Pet. App. 23a-24a).

C. The Legislative History Of Section 280A Demonstrates That Congress' Overriding Goal In Enacting The Statute Was To Prevent Employees From Taking Unjustified Home Office Deductions

The Commissioner's effort to discredit the Tax Court's rejection of the "focal point" test and its establishment of the new "Soliman" test for the deductibility of home office expenses based upon the

legislative history of Section 280A and Congress' rejection of the "appropriate and helpful" standard is misleading. Congress enacted Section 280A and rejected the "appropriate and helpful" standard not as a result of abuses by independent contractors such as SOLIMAN, but because employees were deducting home office expenses "if the maintenance of the office [was] 'appropriate and helpful' to the employee's business." H.R. Rep. No. 658, 94th Cong., 1st Sess. 157 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 145 (1976); General Explanation of the Tax Reform Act of 1976, H.R. No. 10612, 94th Cong., 2d Sess. at 137.

Prior to the enactment of Section 280A, there were two Internal Revenue Code sections which governed the deductibility of home office expenses. Section 162

provided for the deduction of all ordinary and necessary expenses incurred in carrying on a trade or business. In Welch v. Helvering, 290 U.S. 111 (1933) and Commissioner v. Tellier, 383 U.S. 687 (1966), this Court defined "necessary" to mean "appropriate and helpful" to the taxpayer's business. "Ordinary" distinguished a capital improvement from a currently deductible expense.

Code Section 262 provided that no deductions were allowed for personal, living or family expenses. However, Regulation Section 1.262-1 (b)(3) provided that if a taxpayer used part of his house as his place of business, he could deduct an allocable portion of the home's expenses. There was no requirement that the taxpayer use that portion of his home "exclusively and regularly" for business

purposes, as is now required by Section 280A.

In a long line of cases, the Tax Court had held that the Section 162 ordinary and necessary standard should also apply to employees. (See Bischoff v. Commissioner, T.C. Memo 1966-102 [Par 66,102 P-H Memo TC], Gill v. Commissioner, T.C. Memo 1975-3 [Par 75,003 P-H Memo TC], Newi v. Commissioner, 432 F.2d 998 (2d Cir. 1970) and Rafferty v. Commissioner, T.C. Memo 1971-203 [Par 71,203 P-H Memo TC].) In these and similar cases, employees, who were provided with offices by their employers, were voluntarily taking work home with them and thereafter deducting what would otherwise have been personal living expenses. (The legislative history gives an example of a university professor who is provided with an office by his

employer but deducts expenses for the use of a den in his home to grade papers and prepare exams or class notes. H.R. Rep. No. 658, 94th Cong., 1st Sess. 160 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 147 (1976); General Explanation of the Tax Reform Act of 1976, H.R. No. 10612, 94th Cong., 2d Sess. at 139.)

In determining whether the home office expenses of these employees were deductible, the Court would review the applicable "facts and circumstances" and allow the deduction if the office was "appropriate and helpful" to the employee's job. Some employees were thereby allowed the deduction despite the fact that their employer provided them with an office at the job site. In so ruling, the Tax Court continually rejected the Commissioner's argument, as set forth in Revenue Ruling

62-180, 1962-2 C.B. 52, that an employee is entitled to a home office deduction only if he maintains the office as a condition of his employment. (See Johnson v. Commissioner, T.C. Memo 1972-192 [Par 72,192 P-H Memo TC at 985] where the Court stated that an "employee may deduct the expenses of an office in his home even though he is not 'required' to maintain one as a condition of his employment.") The legislative history also cites a case (Anderson v. Commissioner, T.C. Memo 1974-49 [Par 74,049 P-H Memo TC]) where the appropriate and helpful standard permitted the deduction of home office expenses by an investor who was not in the trade or business of making investments.

The legislative history of Section 280A criticizes the "appropriate and helpful" standard for allowing personal, living and

family expenses to be treated as business expenses. The legislative history states that "there is a great need for definitive rules to resolve the conflict that exists between several recent court decisions and the position of the Internal Revenue Service." H.R. Rep. No. 658, 94th Cong., 1st Sess. 160 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 147 (1976); General Explanation of the Tax Reform Act of 1976, H.R. No. 10612, 94th Cong., 2d Sess. at 139. The Court decisions to which Congress was apparently referring, and the only cases cited in the legislative history, involve employees and investors maintaining home offices. Both the legislative history and Revenue Ruling 62-180 succinctly demonstrate that home office deduction claims by independent contractors

was clearly not the Commissioner's overriding concern.

As enacted, Section 280A allows a home office deduction if the office is used exclusively and regularly as the taxpayer's principal place of business, the place where he meets with clients, or, in the case of a separate structure, an office used in connection with his business. The statute then specifically provides that in the case of an employee, the deduction is allowed only if the office is maintained "for the convenience of his employer." The Tax Court has defined that phrase in various ways, including the requirement that "the employee must maintain the office as a condition of his employment." Mathes v. Commissioner , T.C. Memo 1990-483 [Par 90,483 P-H Memo TC at 2309]. This is exactly the position argued for by the

Commissioner in virtually every case challenging an employee's right to a home office deduction. As a result of Section 280A, no longer would an employee be allowed to claim a home office deduction if it was merely "appropriate and helpful" for him to maintain that office.

D. The New "Soliman" Test For Determining a Taxpayer's Principal Place Of Business Is Entirely Consistent With The Legislative History Of Section 280A And Furthers Congress' Goal In Enacting The Statute

The Commissioner argues that in establishing the new "Soliman" test, the Tax Court is returning to the "appropriate and helpful" standard rejected by Congress (Commissioner's Brief 22). The only similarity between the "Soliman" test and

the "appropriate and helpful" standard is that a review of all of the facts and circumstances of the case is required in order to determine if the taxpayer was entitled to a home office deduction. However, Congress rejected the "appropriate and helpful" standard because it was being applied to employees who were already provided with offices by their employers. As the Tax Court correctly noted, if the principal place of business exception has meaning independent of the meeting with clients exception, an analysis of all of the facts and circumstances must be made.

Analyzing the pertinent facts and circumstances does not mean, however, that the deduction will now be allowed if maintaining the home office is merely "appropriate and helpful" to the taxpayer's business. Deductions which were allowed

under the "appropriate and helpful" standard (i.e., the university professor cited in the legislative history) will clearly be denied under the new "Soliman" test. There is nothing in the language of the statute or the contents of the legislative history which prevents or even discourages a Court from considering all of the facts and circumstances in determining the location of a taxpayer's principal place of business.

The Commissioner points out that the term "principal" as used in the "principal place of business" exception of Section 280A should be given its ordinary meaning, i.e., first, chief or foremost, and that when a taxpayer conducts business at multiple locations, a comparative analysis must be undertaken to determine which of those locations is the principal one.

However, the Commissioner is clearly incorrect in asserting that the Tax Court and the Court of Appeals failed to make this comparison.

The Commissioner cites Meiers, Weissman and Drucker where the appellate courts have determined the location of a taxpayer's principal place of business by comparing several factors, including the "length of time the taxpayer spends in the home office as opposed to other locations." Meiers v. the Commissioner , 782 F.2d 75, 79 (7th Cir. 1986). The Commissioner erroneously contends that this "time" comparison was not made by the Tax Court or the Court of Appeals (Commissioner's Brief 18).

The Tax Court did in fact make this comparison and found that SOLIMAN "spent more hours at the hospitals." The Court determined, however, that a "mechanical

comparison of" hours "can be meaningful [only] if the activities in the home office are similar to the activities at another place of business" (Pet. App. 23a and 21a). After reviewing the relevant facts of the case, the Court concluded that "[SOLIMAN's] business required him to perform two very different functions: (1) to render medical services at hospitals, and (2) to care for administrative chores, e.g., record keeping, gathering of billing information and payments, continuing medical education" (Pet. App. 20a). Therefore, the Tax Court stated "that comparing the number of hours spent at each location is a misleading comparison because the activities are so different from each other" (Pet. App. 20a). The Court then noted that its rejection of a "purely mechanical" comparison is

consistent with Proposed Treasury Regulation Section 1.280A-2(b)(3).

> The proposed regulations recognize that 'if an outside salesperson has no office space except at home and spends a substantial amount of time on paperwork at home, the office in the home may qualify as the salesperson's principal place of business.' The proposed regulations do not require more time to be spent in the home office than on the road. ... The proposed standard is spending 'a substantial amount of time on paperwork at home.' We agree with this standard if the taxpayer has no other available facility to accomplish the administrative chores of his business (Pet. App. 21a).

While the proposed regulation may not have precedential effect, the Tax Court was justified in referring to it in view of the absence of any legislative history defining principal place of business. In addition, the Court of Appeals noted that "the regulation does evince a policy to allow 'home office' deductions for taxpayers who maintain 'legitimate' home

offices, even if the taxpayer does not spend a majority of his time in the office" (Pet. App. 6a).

The Commissioner also mistakenly asserts that the Courts below failed to compare "the significance of ... the activities conducted at each place of business" (Commissioner's Brief 18). On the contrary, the Tax Court carefully considered the functions performed by SOLIMAN at the hospitals and in his home office and concluded that "[b]oth functions were equally essential to a successful medical practice" (Pet. App. 20a).

As stated above, the legislative history of Section 280A provides no guidance as to the meaning of the phrase "principal place of business." All that the legislative history discloses are the

reasons why that phrase was considered important. Therefore, it is the job of the Courts, not the Commissioner, to make the necessary interpretation. The Tax Court, as affirmed by the Court of Appeals, has now made that interpretation. The language of the Soliman decision provides guidance to future courts for application of the three point "Soliman" test, and the following are the factors which must be considered by future courts when determining the location of a taxpayer's principal place of business:

1. The amount of time spent at the various business locations. If the taxpayer performs similar functions at each place of business, a "mechanical comparison of the number of hours spent" at each location is appropriate (Pet. App. 23a). However, in cases where the

taxpayer "has no other available facility to accomplish the administrative chores of his business," no comparison of hours is undertaken (Pet. App. 21a). Instead, the taxpayer must satisfy the "substantial amount of time" test of Proposed Regulation Section 1.280A-2(b)(3) (Pet. App. 21a).

2. The relative importance of the functions performed at the various business locations. A taxpayer will be entitled to a home office deduction only if the activities performed there are at least as important to his business as the activities performed at the other business locations. This requirement can be inferred from the Tax Court's express finding that SOLIMAN's office and hospital "functions were equally essential to a

successful medical practice" (Pet. App. 20a).

3. Additional factors to be considered. In determining a taxpayer's principal place of business, a court should also consider the "business exigencies for having a home office, whether the functions performed in the home office are essential to the conduct of the business, whether the office is suitable for the essential business functions performed there, and the appropriateness of the furnishings" (Pet. App. 22a).

The "Soliman" test is as easy to apply as any facts and circumstances test. Facts must be analyzed and subjective determinations made. Such an analysis is no different than that required to apply most provisions of the Internal Revenue

Code, and is no more subjective than the "focal point" test was itself.

E. The Commissioner's Criticism Of The "Soliman" Test Is Misplaced

In criticizing the third rung of the "Soliman" test (lack of other available office location), the Commissioner notes that similar language was included in the Senate's version of Section 280A (Commissioner's Brief 14) which was rejected in the conference committee's final version of the statute (S. Rep. No. 1236, 94th Cong.,2d Sess. 435 (1976). The inference sought to be drawn from this reference to the legislative history is entirely misleading. The rejected provision would have allowed home office deductions to be claimed by <u>employees</u> who were not provided with offices by their employers (S. Rep. No. 1236, 94th Cong.,2d

Sess. 435 (1976). The clear intent of this provision was to once again prevent <u>employees</u> from taking unjustified home office deductions, since by including that provision, the Senate was ensuring that employees who <u>were</u> provided with offices by their employers would be denied the home office deduction. Why this provision was rejected by the conference committee is unclear. Perhaps they felt that the "convenience of the employer" requirement would adequately solve the problem and thereby render the additional provision redundant. In any event, contrary to the Commissioner's contention, the Courts below <u>are not</u> making the "unavailability" of an office an additional exception to the general disallowance rule of Section 280A. What the Courts have done is merely include "unavailability" as a factor in

their analysis of a taxpayer's principal place of business.

In a misplaced attempt to convince this Court that the decisions below will have a significant effect on the nation's tax revenues, the Commissioner claims that a teacher "who lacks effective after-hours access to school facilities could contend that he is entitled to deduct the expenses of maintaining [a home office] ... even though in terms of both time and importance the teaching profession is centered in the classroom" (Commissioner's Brief 28, Note 20). This assertion is without merit.

Teachers in general are employees of the schools for which they work. As such, they are provided with office facilities to perform the activities required by their jobs. The fact that they may not

have access to that office "after-hours" is irrelevant. Though the Tax Court spoke in terms of a taxpayer not having an "available" office location (Pet. App. 24a), there is no justification for implying that a home office deduction could now be claimed merely because a taxpayer does not have convenient, twenty-four hour access to his employer-provided office. In addition to failing the "availability" test, teachers, as employees, would only be entitled to claim a home office deduction if the office is maintained as a condition of their employment. Few if any school systems have such a requirement.

The Commissioner claims that the Tax Court erroneously distinguished Pomarantz v. the Commissioner, 867 F.2d 495 (9th Cir. 1988) by finding that Dr. Pomarantz

"'spent an insubstantial amount of time in his home office'" (Commissioner's Brief 27). As the Commissioner is aware, the Tax Court is obligated to follow only decisions of the appellate court to which the case in question is appealable. Golsen v. the Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971). Nevertheless, in Pomarantz, the only specific findings of fact on this issue were that Dr. Pomarantz "worked from 33 to 36 hours per week at the hospital" and "spent 150-250 hours per year reading publications" in his home office. Pomarantz v. the Commissioner, 867 F.2d 495, 495 (9th Cir. 1988) In comparison, SOLIMAN "spent 30 to 35 hours per week at the hospitals" and "an average of 2 to 3 hours a day working in his home office"

(Pet. App. 14a). The Tax Court justifiably distinguished Pomarantz.

In arguing that SOLIMAN's home office was not his principal place of business, the Commissioner refers to the "nerve center" vs. "place of operations" test which is used to determine a corporation's principal place of business for diversity purposes (Commissioner's Brief 19, Note 12). The "nerve center" test "places chief emphasis on the locus of a corporation's administrative and executive decision-making." The "place of operations" test focuses "on where a corporation carries on the bulk of its operational and production activities. ... The 'nerve center' test seems appropriate only where a corporation is engaged in multi-state activities in offices and plants located in different states."

Arbee Mechanical Contractors, Inc. v. Capital Sun Corporation, 683 F.Supp. 144, 146, 147 (E.D. Va. 1988). As noted by the Commissioner (Commissioner's Brief 19, Note 12), there is no indication that the Tax Court in any way based its ruling on a diversity of jurisdiction analysis. Nevertheless, since SOLIMAN engaged in the practice of medicine in both Maryland and Virginia, applying the "nerve center" test is not inappropriate. Under that test, SOLIMAN's principal place of business is located at his home office, the "administrative and decision-making" headquarters of his medical practice.

The Commissioner asserts that the decisions below "would vastly expand the class of taxpayers eligible to claim a deduction for 'home office' expenses" (Commissioner's Brief 28). Such expansion

is appropriate only for independent contractors who were unable to deduct what were otherwise legitimate home office expenses because they failed to satisfy the "focal point" test. Suggestion of any other large class of taxpayers is misleading. Only a select group of taxpayers, in circumstances comparable to those of SOLIMAN, will be entitled to take advantage of the rulings below.

Since the Tax Court's decision was issued, subsequent Court opinions indicate no difficulty whatever in applying the "Soliman" test to various facts and circumstances. In fact, taxpayers have been denied home office deductions in at least four cases which cite the Tax Court's Soliman decision. Two of these cases, Mathes v. Commissioner, T.C. Memo 1990-482 [Par 90,482 P-H Memo TC] and

Cadwallader v. Commissioner, 919 F.2d 1273 (7th Cir. 1990) involved university professors who were denied home office deductions because their employers provided them with on-campus facilities. See also Shore v. Commissioner, T.C. Memo 1990-271 [Par 90,271 P-H Memo TC] and McDonald v. Commissioner, T.C. Memo 1991-53 [Par 91,053 P-H Memo TC].

Despite the Commissioner's repeated references to the efforts at analysis undertaken by the Courts in Weissman, Drucker, and Meiers in determining which location was the taxpayers' principal place of business, the Commissioner appears to disregard the actual holdings of those cases and their succinct criticism of the "focal point" test. There is simply no justification for reversing the Court of Appeals and

reinstating the "focal point" test. The "Soliman" test is entirely consistent with the legislative history of Section 280A and furthers the goals that were sought by both Congress and the Commissioner under that statute. Congress and the Commissioner rejected the use of an "appropriate and helpful" analysis because under it, typical "nine-to-five" employees were deducting home office expenses. There is no valid reason for objection to the use of a facts and circumstances analysis with the built-in safeguards provided by the "convenience of the employer" requirement and the comparisons mandated by the "Soliman" test.

As structured by the Tax Court, the "Soliman" test, properly applied, will produce results fair to both the taxpayer and the Commissioner. Conversely, the

"focal point" test clearly leads to unjust and illogical results. As stated by the Tax Court in Wicker v. Commissioner, T.C. Memo 1986-1 [Par. 86,001 P-H Memo TC]

> The surgeon in private practice, operating at the hospital, may in the very narrowest sense earn all his fees in the operating room but he cannot conduct his private practice out of his hip pocket or from a pay telephone down the hall from the operating room. The attorney who confines his practice to litigation may, in the narrowest view, earn all his fees in the courtroom, prosecuting or defending his clients' cases, but he cannot be expected to maintain his practice from the counsel table, or out of the briefcase under his arm. We would not hold that either of those professionals had their "principal place of business" in the operating room or courtroom, respectively... We accordingly have no difficulty in finding that [petitioner's] home office was her principal place of business, in which a substantial part of her work was performed.

Wicker, T.C. Memo at 86-4-5.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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JUNE 1992

Supreme Court, U.S.
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No. 91-998

In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NADER E. SOLIMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. There is no merit to respondent's contention (Resp. Br. 14-22) that, in enacting Section 280A, Congress intended to curtail abuses in the deduction of "home office" expenses only by employees and not by self-employed individuals. The "principal place of business" requirement in the statute is equally applicable to sole proprietors and to employees. Section 280A generally precludes deduction by "a taxpayer who is an individual or an S corporation" of any "deduction otherwise allowable under this chapter * * * with respect to the use of a dwelling unit which is used by the taxpayer * * * as a residence." 26

U.S.C. 280A(a). By its express terms, the statute applies to any "taxpayer" who is an "individual," a term that of course includes any individual" who files a return as the sole proprietor of a business. No court has adopted (or even addressed) respondent's novel assertion that the statutory restriction on home office deductions does not apply to self-employed individuals.

With respect to employees, Congress imposed a separate and additional requirement for the deductibility of home office expenses. While self-employed individuals need only establish that their home office is "exclusively used on a regular basis" as their "principal place of business" (26 U.S.C. 280A(c)(1)(A)), employees must additionally show that "the exclusive use * * * is for the convenience of his employer" (26 U.S.C. 280A(c)(1)). The additional requirement for employees under Section 280A(c)(1) confirms that the basic requirement of the statute—that the home office be the taxpayer's "principal place of business"—applies also to individuals who are *not* employees, and thus to individuals who are self-employed.

That Congress contemplated that Section 280A would apply to the self-employed is further evidenced by Section 280A(c)(1)(B), which allows a deduction for home offices used for meeting or dealing with the taxpayer's "patients" or "clients." 26 U.S.C. 280A(c)(1)(B). This exception obviously is directed to such traditionally self-employed individuals as doctors, lawyers and accountants who practice their profession from their homes.

Nothing in the legislative history even remotely suggests that the inclusion of "individual" taxpayers (including individuals who are self-employed) in the restrictions established by Section 280A was an oversight. Respondent points (Resp. Br. 19-20) to passages in the Committee Reports recounting that many employees who maintained offices in their homes had invoked the preexisting "appropriate and helpful" standard to claim deductions for the inherently personal expenses they incurred in maintaining their residences. But the fact that Congress considered abuses by employees worthy of specific mention (and specific treatment) does not mean that similar abuses by the self-employed are not also subject to the plain requirements of Section 280A or that Congress intended to give self-employed individuals a tax advantage that was denied to employees.

In particular, nowhere does the legislative history suggest that self-employed individuals would somehow be exempted from the "principal place of business" requirement adopted in Section 280A(c)(1)(A). The abuses resulting from home office deductions under the preexisting "appropriate and helpful" standard were described by Congress in the most general terms, without making any distinction between employees and the self-employed. See H.R. Rep. No. 658, 94th Cong., 1st Sess. 160 (1975); S. Rep. No. 938, 94th Cong., 2d Sess. 147 (1976). As this case reflects, the potential for abuse of home office deductions as a means for recovering personal living expenses is equally present for the self-employed as for employees. Congress did not omit the self-employed in curtailing the improper deduction of home office expenses by any "taxpayer" who is an "individual." 26 U.S.C. 280A(a).

2. As is discussed in our opening brief (Pet. Br. 14-18), the text and history of Section 280A require that a comparison be made between the various locations where an individual conducts his trade or business to determine *which* place of business is the one *principal* place of his business. The courts below

concluded, however, that the office in respondent's spare bedroom was his "principal place of business" because that office was "essential" to his business, he spent a "substantial" amount of time there, and he used no other location for performing the administrative tasks of his business (Pet. App. 5a, 24a). The fundamental defect of the approach taken by the courts below is that it fails to compare the relative importance of respondent's various places of business to determine which was the "principal" one.

Respondent relies (Br. 30-31) on the conclusion of the Tax Court that the professional medical activities respondent performed at the hospitals, and the ministerial duties he performed at home, "were equally essential to a successful medical practice" (Pet. App. 20a). That a taxpayer has an "essential" need for an office in his business, and chooses to maintain that office in his home, establishes only that the taxpayer's home office is an "appropriate and helpful" place where he carries on business activities. Congress clearly rejected the "appropriate and helpful" standard in enacting the "principal place of business" requirement in Section 280A(c)(1)(A). See Pet. Br. 12-13 & n.5.

The fact that an office is "essential" to a business, and that no other office location is used by the taxpayer, does not make the home office the "principal" place of the business. Record-keeping and other administrative support activities may be "essential" or "important" to the business, but it robs words of their meaning to assert that the place where these ancillary, supporting functions are performed is "the principal place of business" of the taxpayer.[1] By

[1] Congress considered, but rejected, a proposal similar to that adopted by the court of appeals in this case. The Senate version of the bill that contained Section 280A included a provision that would have allowed an employee to deduct home office expenses if the employer did not provide the employee with an office (S. Rep. No. 938, *supra*, at 148). That provision was deleted in conference (S. Conf. Rep. No. 1236, 94th Cong., 2d Sess. 435 (1976)) and was not enacted by Congress.

applying Section 280A(c)(1)(A) as if it allowed a home office deduction for the principal *office* of the taxpayer's business, rather than for the principal *place* of the taxpayer's business, the courts below ignored the plain language of the statute.

3. Apparently accepting that a comparative analysis of the different locations where business is performed is required in determining the "principal place" of his business, respondent claims (Br. 28, 30-31) that the administrative duties he performed in his home office were as important as the medical duties that he performed at the three hospitals where he treated patients. That contention defies common sense and deprives the words of the statute of their ordinary meaning. See *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966) (quoting *Crane* v. *Commissioner*, 331 U.S. 1, 6 (1947) ("the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses")).

Here, as in *Pomarantz* v. *Commissioner*, 867 F.2d 495 (9th Cir. 1988), "the hospital, rather than the home, was [the doctor's] principal place of business. He consistently spent more time on duty at the hospital rather than at home. The essence of his profession is the hands-on treatment of patients which he did only at the hospital and never at home. Finally, he generated income only by seeing patients at the hospital not studying or writing at home. His home office was not his principal place of business within 26 U.S.C. § 280A(c)(1)(A)." 867 F.2d at 497-498.

It is the performance of medical functions, not billing and record-keeping, for which respondent underwent many years of schooling and training. The administrative duties that he performed in his home office, although necessary to his business, cannot be said to be his "principal" business activity. It is certainly not the activity for which patients hire his services. While a doctor must maintain patient records for billing and other purposes, these administrative duties can be performed at many other locations by less highly trained individuals.[2] The same obviously cannot be said of the medical duties that respondent performed at the hospitals.

Moreover, respondent has acknowledged (Pet. App. 14a) that he spent considerably *more* time at the hospitals providing medical care than he did attending to administrative duties in his home office. More than half of respondent's total working time was spent at Suburban Hospital (*ibid.*), where he "administer[ed] anesthesia to patients before surgery, car[ed] for patients immediately after surgery, and treat[ed] patients for pain" (*id.* at 13a). In terms both of the importance of the duties performed and the amount of time expended in generating his business income, Suburban Hospital was respondent's "principal place of business" under any logical interpretation of the words of the statute. See *Pomarantz* v. *Commissioner*, 867 F.2d at 497-498; Pet. Br. 15-16.

The courts below erred by failing to engage in the comparative analysis required by the statute and by misreading the statute to permit deductions for the principal *office* of the business rather than the prin-

[2] Indeed, respondent employed a billing service working at another location to assist in preparing the bills for his patients (C.A. App. 38-39, 119).

cipal *place* of the business. The location where respondent spent the *lesser* part of his time, and performed the *less* important business activities of his profession, cannot constitute the taxpayer's "principal place of business" under Section 280A(c)(1)(A).

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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